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13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 TERESA DYKZEUL,
16 Plaintiff,

17 vs.

18 CHARTER COMMUNICATIONS
19 INC.,
20 Defendant.

Case No. 2:18-cv-05826 DSF (GJSx)
Assigned to Hon. Dale S. Fischer

**DEFENDANT CHARTER
COMMUNICATIONS, INC.'S
POST-TRIAL CLOSING
ARGUMENT BRIEF**

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1 **I. INTRODUCTION**

2 In October 2016, Plaintiff Teresa Dykzeul (“Dykzeul”) applied for a position
3 as a Direct Sales Representative (“DSR”) with defendant Charter Communications,
4 Inc. (“Charter”) in the region around Turlock, California. Although the person who
5 interviewed her, Charter Direct Sales Supervisor Jim Swift, was otherwise
6 impressed with Dykzeul and wanted to hire her, he ultimately did not do so because
7 Dykzeul was unable to work Saturdays, which was a requirement for the position.

8 Dykzeul contends now that Swift’s decision was based on intentional
9 discrimination against her religion and that his conclusion that the accommodation
10 that Dykzeul proposed – to allow her to work Sundays instead – would impose an
11 undue hardship on him and Charter constituted an unlawful failure to
12 accommodate. But the evidence at trial showed Dykzeul’s claims lack merit. In
13 particular, Dykzeul not only failed to introduce a shred of evidence that Swift or
14 Charter were motivated by animus or ill will towards Dykzeul’s religion, she
15 actually stipulated before trial that the “only reason that Swift did not hire Dykzeul
16 was because she could not work Saturdays.” Swift’s decision was based solely on
17 her unavailability on Saturdays, as Dykzeul stipulated, and not because he harbored
18 prejudice against her religion.

19 As for Dykzeul’s claim for failure to accommodate, the preponderance of
20 evidence establishes that in October 2015, DSRs who worked in the territories
21 overseen by Swift (Turlock, Gilroy and San Luis Obispo) were required work on
22 Saturdays. That did not mean they could not occasionally be excused from a
23 Saturday or would be subjected to discipline if they missed a Saturday; but rather
24 they had to be *available* to work Saturdays to be eligible for the job and that, unless
25 they had hit their sales targets the prior month and were on target to hit their sales
26 targets the current month, they could not be excused from working on a Saturday.
27 Dykzeul, however, was not available to work on *any* Saturdays, and this posed a
28 problem for Swift.

1 Swift liked Dykzeul and wanted to hire her, so he spent the weekend after her
2 Friday interview trying to think of a way to work around Dykzeul's Saturday
3 unavailability. During the interview, Dykzeul suggested she work Sundays instead,
4 and, indeed, Swift did *occasionally* permit a DSR to work on a Sunday. However,
5 in Swift's and those DSR's experiences, including the experience of former DSRs
6 Daniel Blond and Krystyna Amaral (both trial witnesses), Sundays were simply not
7 good sales days and not an adequate substitute for Saturday work. Moreover, if a
8 DSR worked on a Sunday, Swift had to be on call during the time the DSR worked
9 to answer questions and respond to emergencies. Swift already worked six days a
10 week, and he determined it would be an undue hardship on him if he had to work
11 every day of *every* week, all year long. Thus, Swift decided he could not
12 accommodate Dykzeul by allowing her to swap Saturdays with Sundays and .
13 proposal and did not hire Dykzeul.

14 At trial, Dykzeul proposed other potential accommodations that she claims
15 could have been considered, such as allowing her to start early on weekday
16 mornings or work part-time, or by hiring another employee part-time to cover her
17 Saturdays or by assigning a portion of her territory each Saturday to other DSRs.
18 The evidence at trial established that none of these accommodations were feasible,
19 either. Early weekday mornings when people are asleep or off to work or school
20 were no substitute for Saturdays (the best sales day of the week, per Swift); Charter
21 did not employ part-time DSRs or have a commission plan or territorial assignment
22 and rotation system in place to accommodate part-time DSRs; and Charter did not
23 want DSRs selling in each other's territories for good reasons, as detailed herein.

24 Based on these claims, Dykzeul asks the Court to award her damages,
25 including \$425,530.72 (assuming she made \$100,000 per year, plus benefits) or
26 \$258,062.29 (assuming she made \$75,000 per year, plus benefits) for four years of
27 allegedly lost earnings, \$500,000 in emotional distress damages, and punitive
28 damages. Dykzeul's damages calculations have no basis in reality, and are based

1 entirely on language about a DSR's earnings "potential" "[i]f sales targets are met"
2 and Dykzeul's belief, without foundation, that selling Charter's products was easy
3 and that she would have been a superstar performer there until she retired. The
4 truth is, of the 29 DSRs who worked in the Turlock territory between October 2015
5 and October 2018, only *one* made an average of \$75,000 or higher per year. Only
6 *one* DSR reporting to Swift regularly made her or his targets. And of those 29
7 DSRs, 73.3% lasted less than nine months on the job.

8 The DSR position was not an easy job. It was a door-to-door sales job that
9 required each DSR to cover a territory of 400 to 500 assigned addresses each
10 month. To make as many contacts as possible, which would hopefully lead to
11 conversations and ultimately sales, DSRs were required to knock on at least 50
12 doors per day and be available to work weekdays (particularly the "hot time" of
13 3:00 or 4:00 in the afternoon until 8:00 or 9:00 in the evening) and Saturdays. The
14 job required the DSR to understand Charter's products, their pricing, and
15 competitor offerings. It also involved a lot of walking, a lot of perseverance, and a
16 lot of rejection. Most people did not stay in the job long.

17 Dykzeul's beliefs about how long she would have worked as a Charter DSR
18 and how successful she would have been are also discredited by her actual
19 performance at one of her subsequent employers, Patient Care America ("Patient
20 Care"), and her attempts to conceal this fact from Charter and the Court in this
21 proceeding. Patient Care terminated Dykzeul's employment for poor performance
22 and lack of sales; Trial Exhibits 27 and 55 document Dykzeul's deficiencies,
23 confirmed by the testimony of Indira Seoane, Patient Care's human resources
24 director at the time. Yet, this was almost not known in this case. Contrary to
25 Dykzeul's actual performance at Patient Care, Dykzeul testified in this case that
26 things went "well" at Patient Care and that she had received a "great 90-day
27 evaluation in February 2018." Dkt. 142 at 7:26-28. She claimed she did not know
28 why she had been let go from Patient Care, and attempted to blame it on retaliation

1 for taking medical leave. *Id.* at 8:6-9. Worse, she also redacted the records
2 produced by Patient Care in response to a subpoena to hide the real reason she was
3 terminated at Patient Care. At trial, the unredacted records were produced and
4 admitted into evidence, Seoane testified, and it was established that Dykzeul was an
5 extreme underperformer at Patient Care who struggled to make sales, was
6 disorganized, and ultimately was terminated for poor performance.

7 When a witness deliberately testifies untruthfully, that witness's credibility is
8 cast into such doubt that, in a jury trial, jurors are even instructed they can choose
9 not to believe a word the witness has said. MCJI 1.14. Here, Dykzeul has tried to
10 inflate her damages and create the false impression that she was a superstar
11 performer everywhere she worked. In fact, she was a serial job-hopper who worked
12 at eight different employers between October 2018 and 2019 and who was
13 terminated from at least one of them for poor performance. Dykzeul's willingness
14 to flout the truth when presenting her claims and assertions in this case should color
15 everything she has claimed in this case, not just about damages, and especially
16 when her testimony regarding other matters conflicts with that of other witnesses.

17 At the end of the day, Dykzeul's claims should each be rejected. She has not
18 proven her claims and, in the case of her failure to accommodate claim, Charter has
19 established that Dykzeul's proposed accommodations would have imposed an
20 undue hardship (*i.e.*, more than a de minimis burden) on Charter and its employees.
21 Dykzeul's damages claims should also be rejected as grossly inflated, and of course
22 no punitive damages should be awarded because there was no evidence at trial that
23 would warrant their imposition. Accordingly, this Court should enter judgment in
24 favor of Charter on all of Dykzeul's claims.

25 **II. THE TRIAL**

26 A three-day bench trial was conducted in this matter from July 20-22, 2021.
27 The Court heard live testimony from Dykzeul, former Charter Direct Sales
28 Supervisor Jim Swift, former DSRs Krystyna Amaral and Daniel Blond, Dykzeul's

1 damages expert Wesley Nutton, and Charter's damages expert Amy Aukstikalnis.
2 The parties also submitted into evidence the deposition testimony of former Charter
3 in-house recruiter Tamara Prunty, former DSR Neila Deneen, and direct testimony
4 declarations from Dykzeul, Nutton and Aukstikalnis. The Court also admitted trial
5 exhibits from the parties' joint exhibit list into evidence.

6 **III. STATEMENT OF FACTS**

7 **A. Dykzeul Applied At Charter To Work As A DSR, A Challenging**
8 **Job That Experienced Frequent Turnover**

9 This case concerns Dykzeul's application for a DSR position at defendant
10 Charter in October 2015. Stipulated Fact No. 1 from the Parties' Joint Stipulation
11 of Facts Deemed Admitted for Trial, Dkt. 137 ("SF No. _"). One of Dykzeul's key
12 contentions in this case has been that her success at Charter was virtually
13 guaranteed, including that sales were easy to achieve and that she would have
14 worked there until she retired. Dkt. 142 at 9:25-10:2. In fact, although some
15 people have been successful as DSRs, most people have found it challenging, and
16 turnover in the position is high.

17 DSRs are exempt sales employees that go door-to-door selling cable,
18 internet, and telephone services. SF No. 2. At the time of Dykzeul's application in
19 October 2015, DSRs reporting to Swift were given approximately 400 leads per
20 month. 7/21/21 Trial Tr. at 211:17-25. Charter had a systematic way it wanted to
21 work the territory, to ensure that DSRs did not just go "wherever they wanted." *Id.*
22 Overall, each territory had a six-month rotation, where Charter tried to cover the
23 entire territory during the six-month period before starting the rotation over. *Id.* at
24 212:4-16. The purpose of the strategy was to ensure that DSRs did not simply go
25 back to the same addresses and contact the same people over and over. *Id.* at
26 213:1-13. Overworking the same territory too frequently irritated potential
27 customers and was not productive. *Id.*

28 ///

1 The DSR job is physically hard and involves walking “a lot of mileage,”
2 according to former Charter DSR Daniel Blond, who testified at trial. 7/20/21 Trial
3 Tr. at 78:2-12. Blond testified that he would have to get new shoes every so often
4 due to all the walking, and that he “lost a lot of weight” from the “workout” he got
5 each day. *Id.* Another former DSR, Krystyna Amaral, testified that the “most
6 difficult part of the job was the people I would deal with.” *Id.* at 100:3-6. “If they
7 slammed the door on my face or didn’t want to talk to me, it was, a personal thing
8 for me.” *Id.*

9 Swift found that it was not easy to make sales as a DSR. 7/21/21 Trial Tr. at
10 239:3-4. While working at Charter, Swift once analyzed the percentage of Charter
11 DSRs nationwide who were hitting their targets and determined that roughly only
12 8-10% of all DSRs successfully hit their targets. *Id.* at 219:20-220:12. This was
13 consistent with what Swift observed for the DSRs who reported to him. *Id.* At the
14 time, in addition to Turlock, Swift supervised the Gilroy and San Luis Obispo
15 territories. Stipulated Fact No. 6.

16 Swift also refuted Dykzeul’s contention that “selling Internet, cable and
17 phone service did not require much explanation about the product and only about
18 the different options and pricing.” 7/21/21 Trial Tr. at 238:22-239:2. For example,
19 on a typical day, Swift would receive up to 5 to 10 calls from DSRs in the field
20 needing assistance, whether it was an upset customer, an installer that was missed, a
21 pricing issue, a question about the product, or a question about competitors. *Id.* at
22 205:22-206:10. DSRs also faced unique hurdles in the Turlock territory.
23 Specifically, the Turlock territory had a worse reputation than the other areas Swift
24 supervised, because Charter had a bad reputation there for reliability of service.
25 7/20/21 Trial Tr. at 189:4-12.

26 Swift did not have any DSRs that worked for him until retirement. 7/21/21
27 Trial Tr. at 238:1-13. To the contrary, most DSRs ultimately left the job due to a
28 lack of production and the frequent rejection they faced when trying to make sales.

1 *Id.* at 238:14-21. As Swift explained:

2 Ultimately, they're not making enough money to stay. But
3 couple that with the rejection that we receive every day
4 which is probably about 98 percent of the people we speak
with, it's a difficult job. It's tough to take that every day of
your life and deal with it.

5 *Id.*

6 Aukstikalnis testified that **73.3%** of the Charter DSRs who worked in
7 Turlock between October 2015 and October 2018 worked as a DSR for *less than*
8 nine months. 7/21/21 Trial Tr. at 364:11-15; 370:14-25; Dkt. 143, Aukstikalnis
9 Trial Decl. at 4:4-5.

10 **B. Dykzeul Applied For The DSR Job At Charter Knowing It**
11 **Required Friday Evening And Weekend Work, Representing That**
She Was Available Those Times

12 Before Dykzeul interviewed for a DSR position with Charter, she filled out
13 an application. Trial Exhibit ("TE") 1. The job application and DSR job
14 description both explicitly stated that the ability to work weekends and evenings
15 was a requirement. TE 1, p. 11; TE 29, p. 2. Specifically, "**Must be available**
16 **weekends and evenings**" was listed as a "Qualification" for the position in the job
17 description:

18 Qualifications

- 19 •1 year sales and customer service experience is a plus
- 20 •Must enjoy working with the general public
- 21 •Must be enthusiastic, outgoing, and customer service oriented
- 22 •Must have excellent communication and interpersonal skills
- 23 •**Must be available weekends and evenings**
- Must be at least 18 years of age
- Must pass background/drug screen

24 TE 29, p. 2.

25 Dykzeul submitted her application for a DSR position in Turlock, California
26 on October 5, 2015. Dkt. 142, 3:17. As Dykzeul has stipulated, "[t]he application
27 asked if Dykzeul was able to work evenings and weekends, to which Dykzeul
28 answered that she could." SF No. 3. This is confirmed in Dykzeul's job

1 application:

2 4. Are you able to work evenings and
3 weekends?

4 Type: Single Answer

X Yes

No

Result for question:

5 TE 1, p. 11.

6 After Dykzeul applied for the DSR position, Tamara Prunty, a Charter
7 recruiter, pre-screened Dykzeul by telephone. SF No. 4. Prunty's testimony was
8 presented at trial by way of deposition designations. Dkts. 148 and 149. Prunty's
9 job was to review applications and resumes candidates submitted through Charter's
10 applicant tracking system or on job boards. Dkt. 148, Prunty Depo. at 18:10-19:4.
11 It was Prunty's responsibility to determine which candidates to schedule for an
12 interview based on their answers to questions in the application and their
13 experience and work history; she looked to ensure that they met the minimum
14 requirements of the position. *Id.* at 19:12-23, 20:16-21:6.

15 During her prescreening calls, Prunty would review with each candidate the
16 hours that DSRs were required to be available. Dkt. 148, Prunty Depo. at 24:2-25,
17 25:15-26:17, 26:24-27:11. Prunty stated what the job requirements were, and then
18 asked candidates if they were able to fulfill all of the requirements. *Id.* at 32:21-
19 33:14. Regarding work hours, Prunty told candidates during the prescreen calls that
20 DSRs "work evenings and Saturday." *Id.* at 33:15-35:1. Although Prunty did not
21 specifically recall her prescreening call with Dykzeul, she testified that she
22 conducted every prescreen "exactly the same" and that the calls always covered
23 "the same questions." *Id.* at 35:5-18, 36:22-37:5. Prunty only moved a candidate
24 to the next step of the application process, an interview with the sales supervisor, if
25 she was satisfied that the applicant met the required qualifications and was able to
26 meet the job's requirements, including the ability to work weekday evenings and
27 Saturdays. *Id.* at 19:12-21:6, 24:2-26:27:11, 33:15-35:1.

28 ///

1 C. **The *Only* Reason Swift Did Not Hire Dykzeul Was Because She**
2 **Could Not Work On Saturdays**

3 On October 15, 2015, Swift interviewed Dykzeul for the DSR position. SF
4 No. 5. Swift told Dykzeul during the interview that the availability to work
5 Saturdays was a requirement for the DSR position. SF No. 7. The parties agree
6 and have stipulated that, during the interview, Dykzeul told Swift she could not
7 work Friday nights and Saturday afternoons due to her observance of the Sabbath.
8 SF No. 10.

9 The parties disagree about whether Dykzeul said she could work Saturday
10 nights after sundown. Dykzeul claims now that she offered to work Saturday nights
11 during her interview with Swift. Dkt. 142, p. 5. But, in Dykzeul's personal notes
12 from her interview with Swift and her December 27, 2017 EEOC discrimination
13 charge submitted under penalty of perjury, she wrote that she had told Swift about
14 her "inability to work Saturdays," without any reference to an offer to work
15 Saturday nights instead. 7/21/21 Trial Tr. at 307:3-310:24; TE 18, pp. 4-5. Swift
16 also denied in his testimony that Dykzeul offered to work Saturday nights. 7/21/21
17 Trial Tr. at 224:1-2. Swift testified that Dykzeul told him she would have to stop
18 work on Friday evenings to be somewhere by 7:00 pm, and that she could not work
19 on Saturdays. *Id.* at 223:18-25.

20 Swift understood from Dykzeul that her unavailability to work Fridays after
21 7:00 and Saturdays was due to a religious issue, but he did not know or ask
22 anything further about her religion. 7/21/21 Trial Tr. at 233:3-234:2; *see also* SF
23 No. 11. He did not know or ask what her faith was, what church she belonged to,
24 or whether she was in a synagogue. *Id.* Indeed, he had no ill will or prejudice at all
25 against Dykzeul because of her religious background. *Id.*

26 Dykzeul has stipulated that Swift thought Dykzeul had potential as a DSR
27 and wanted to hire her. SF No. 13. Swift had no problem with Dykzeul having to
28 stop work early on Fridays, because he understood she would only miss about an

1 hour and a half of that time. 7/21/21 Trial Tr. at 224:5-14. However, if Dykzeul
2 had told Swift that she could not work past sundown on Fridays (which is what she
3 now claims to have told him), that would have posed a larger problem because,
4 during the winter, that would take out most of the prime Friday evening sales hours.
5 *Id.* at 224:14-225:6. Regardless, Swift's concern at the time was with Dykzeul's
6 inability to work Saturdays. *Id.*

7 Swift's concern about Saturdays was that, in his experience, Saturdays were
8 the most productive day of the week. 7/21/21 Trial Tr. at 225:9-15. In Swift's
9 experience working as a DSR before Charter and then as a DSR Supervisor at
10 Charter, the most successful times for selling cable, Internet and phone service were
11 4:00 to 9:00 pm on weekdays and on Saturdays, because that was when more
12 decision-makers were at home from work. *Id.* at 201:12-23. Within the 400
13 addresses assigned each month to each DSR, Swift found there was a mix of people
14 who would be home during the weekdays, the weekday evenings and weekends.
15 *Id.* at 212:14-214:19. Working on Saturdays allowed DSRs to make contact with
16 customers that might not be available on the weekdays and to reach customers
17 when all the decision-makers were home. *Id.* at 215:2-18. Thus, Swift was
18 concerned that if Dykzeul could not ever work on Saturdays, there would be some
19 customers that would simply never be reached and thus sales that could never be
20 achieved. *Id.* at 225:9-15.

21 Other witnesses also testified about the importance of Saturdays. Amaral
22 found Saturdays provided her an opportunity to "get in front of those doors that
23 weren't home during the week." 7/20/21 Trial Tr. at 102:20-103:3. Blond testified
24 that, unless he worked Saturdays, he was unable to hit about 75 of his assigned
25 leads each month. *Id.* at 80:17-81:2. In Blond's experience, on Saturdays, there
26 were "definitely a lot more contacts of people at home." *Id.* at 59:10-16. Blond
27 also testified that he was able to make sales "[j]ust about every Saturday" he
28 worked. *Id.* at 68:7-8.

1 Swift contemplated what to do over the weekend after the interview. 7/21/21
2 Trial Tr. at 225:16-227:12. Swift testified that he thought about alternatives,
3 including letting Dykzeul try to make up the time on weekday mornings or
4 Sundays. *Id.* With respect to weekday mornings, Swift dismissed the idea “quickly
5 ... because morning hours on the weekdays just are not that productive.” *Id.*
6 Swift’s conclusion that weekday mornings were not an adequate substitute was
7 backed up by Blond, who testified that working early on the weekdays was
8 unproductive. 7/20/21 Trial Tr. at 72:3-15. As Blond put it, “you’re basically
9 walking around half-empty neighborhoods” because “the majority of everybody is,
10 you know, working during the day.” *Id.*

11 Swift also considered allowing Dykzeul to work Sundays instead, which is
12 what he understood she had proposed in the interview. 7/21/21 Trial Tr. at 225:16-
13 227:12. As he explained:

14 And I felt, you know, I’ve got to hire someone to set them
15 up to be successful. It’s got to be good for them. It’s got to
16 be good for the company. Otherwise, they’re just going to
17 transition out. So then I really gave it a long hard thought
about, okay, she volunteered to work on Sundays. Can I
make that work? And I gave it a lot of consideration.

18 *Id.*

19 Swift’s primary problem with allowing Dykzeul to work on Sundays was that
20 it meant he would have to be on call on Sundays as well. *Id.* And as he explained,
21 he was already working six days per week and he did not want to have to work all
22 seven days (every week) as would be required for Dykzeul to work Sundays. *Id.*
23 Swift was willing to work Sundays occasionally to try to let a DSR catch up on his
24 or her quota, but he did not want to have to work every Sunday. *Id.* at 235:15-
25 236:8.

26 Swift also knew that Sunday hours were unproductive, based on his own
27 sales experience. 7/21/21 Trial Tr. at 225:16-227:12; *see also Id.* at 211:5-6. It was
28 extremely rare for a DSR who reported to Swift to work Sundays. *Id.* at 211:7-8.

1 Thus, Swift concluded that allowing Dykzeul to work Sundays instead of Saturdays
2 would not work:

3 I just felt, you know, this job is tough enough. You've
4 worked 30 years working six days a week. I don't know that
5 I can do seven days a week for any length of time. So either
6 she'll transition out or I will. And that really was kind of
7 the bottom line is if she works Sundays, I've got to be on
8 call.

9 What happened. She's in Turlock. At the time I was living
10 in either Gilroy or Hollister; and if something happened to
11 her and things happen in the field, but you're going to have
12 to go there.

13 You can't wait to the very last second on Monday to
14 investigate an accident, a customer that gets upset at you at
15 the door and does something that they shouldn't which
16 happens.

17 But I did think about it quite a bit over the weekend. I
18 remember that that's why I remember this whole – that's
19 why I remember her.

20 And I just -- I came to the conclusion that I just didn't think
21 it would work plus it did, you know, I thought back to my
22 Sundays that I used to work. When I first got in the
23 business, I worked a lot of Sundays. I just didn't produce
24 much on Sundays. People go to church. People don't want
25 to be bothered by door-to-door salespeople for the most
26 part but especially on Sundays. So I found -- I eventually
27 just said -- I stopped working Sundays, period, because of
28 it. It just didn't produce enough income to be away from
my family every Sunday. So that's it.

19 *Id.*

20 Other DSRs also testified that Sundays were unproductive sales days for
21 DSRs at Charter. Blond testified that he tried working Sundays, and although he
22 had more customer contacts, he never made a single sale on a Sunday. 7/20/21
23 Trial Tr. at 67:20-68:6. Amaral tried working three or four times on Sundays, but
24 found that "there was a lot of people out for church and things like that." *Id.* at
25 103:17-21.

26 In the end, Swift made his decision not to hire Dykzeul by Sunday evening or
27 Monday morning. 7/21/21 Tr. at 234:3-4. He attempted to call her to tell her of his
28 decision, but did not reach her. 7/21/21 Tr. at 234:5-14. Swift had concluded that

1 Dykzeul could not work Sundays instead of Saturdays because it would require him
2 to work seven days a week. Stipulated Fact No. 14. Charter did not hire Dykzeul
3 for the DSR position, and Swift was the only one who made the decision not to hire
4 Dykzeul. Stipulated Fact Nos. 15 & 16. The only reason Swift did not hire
5 Dykzeul was because she could not work on Saturdays. Stipulated Fact No. 17.

6 **D. DSRs Who Reported To Swift As Of October 2015 Were Required**
7 **To Work On Saturdays**

8 Dykzeul contends in this proceeding that DSRs were not required work on
9 Saturdays when she applied for the DSR position in October 2015, and that
10 Charter's claim that DSRs were required to work Saturdays is an elaborate lie.
11 Dykzeul relies on the fact that DSRs did not record vacation or sick days and were
12 not subject to discipline if they missed a Saturday, and testimony from former
13 DSRs, who worked during a different time period and under different policies, that
14 some DSRs were occasionally permitted to miss work on a Saturday, to support her
15 contention that DSRs did not need to work on Saturdays. But the fact that some
16 DSRs were occasionally allowed to miss a Saturday, or that employees were not
17 formally disciplined for missing a Saturday, does not mean that DSRs were not
18 required to work Saturdays.

19 As Swift explained in his testimony, in October 2015, working Saturdays
20 was a requirement for all DSRs who reported to Swift. 7/20/21 Trial Tr. at 150:15-
21 22; 7/21/21 Trial Tr. at 215:20-23. DSRs were required to be available to work on
22 Saturdays because, in Swift's experience, Saturday was the best production day of
23 the week. *Id.* at 215:24-216:2. Swift learned of the Saturday work requirement
24 from Bob Reese, Swift's sales manager when Swift started at Charter in 2012. *Id.*
25 at 218:7-24.

26 Dykzeul was advised of the policy during her job application process. As
27 noted previously, both the DSR job application and job description explicitly stated
28 that the ability to work weekends and evenings was a requirement. TE 1, p. 11; TE

1 29, p. 2. And, as Dykzeul has stipulated, DSRs were not required or expected to
2 work on Sundays, and Sundays were not considered regular workdays or part of the
3 regular work schedule for DSRs (SF No. 9), leaving Saturday as the only other
4 weekend day.

5 Saturday hours started at 9:00 or 9:30 am in October 2015, and the end-of-
6 day call was at either 2:00 or 3:00 pm. 7/21/21 Trial Tr. at 200:17-24. That did not
7 mean a DSR could not sometimes take a Saturday off. In October 2015, Swift also
8 had a system in place where a DSRs could be excused from working a Saturday *if*
9 they had met their previous month's sales target *and* were on pace to meet the
10 current month's target. *Id.* at 216:3-13. Thus, if a DSR wanted to take a Saturday
11 off, the DSR did not have to take a vacation day, but Swift would look to see how
12 the DSR was doing towards hitting her or his quota before deciding whether to let
13 the DSR have that Saturday off. 7/20/21 Tr. at 160:21-161:12.

14 The work requirements later changed, so that anyone who had met the prior
15 month's target and was on target for the current month could stop work early on a
16 given day once they achieved two sales. 7/21/21 Tr. at 218:25-219:12. This
17 applied to Saturdays as well as weekdays. *Id.* Then, around May 2019, the policy
18 changed again to allow DSRs to take up to two Saturdays off per month. *Id.* at
19 243:3-244:1. But very few DSRs, if any, took off any given Saturday. *Id.* at 217:4-
20 10.

21 This was corroborated by other witnesses. Both Blond and Amaral testified
22 that they were told in their job interviews that Saturday work was required. 7/20/21
23 Trial Tr. at 45:10-16; 91:23-92:7. Blond worked at Charter from February 2018 to
24 September 2018 (*i.e.*, for about 9 months, three years after Dykzeul's interview).
25 *Id.* at 70:14-71:3. Blond admitted he had no idea what the weekly scheduling
26 requirements were at Charter for DSRs before the time he worked there. *Id.* at
27 71:4-8. While Blond worked at Charter, it was stressed to him that DSRs worked
28 six days a week. *Id.* at 75:4-12. Blond agreed that not working on a Saturday was

1 “discouraged, greatly discouraged.” *Id.* at 64:13-23.

2 Amaral started working for Charter around November 21 or 22, 2017, *i.e.*,
3 two years after Dykzeul interviewed at Charter. 7/20/21 Trial Tr. at 89:19-21.
4 Amaral also had no knowledge about whether Saturdays were required for DSRs in
5 October 2015. *Id.* at 114:13-15. Amaral testified that Saturday hours ran from
6 “8:00 to 11:00 or 9:00 to 2:00 roughly” while she worked as a DSR, and the
7 Saturday hours would change sometimes. *Id.* at 106:15-18. Amaral claimed she
8 learned eventually that working Saturdays was not strictly “required,” but that it
9 was “encouraged” and that failure to do so was “frowned upon.” *Id.* at 101:24-
10 102:19. Amaral did miss a few Saturdays, but only a “handful”; the majority of the
11 time, she did work Saturdays. *Id.* at 102:20-103:3.

12 Denneen admitted that she had difficulty recalling matters from her time as a
13 DSR between 2013 to 2016, because she had “a major surgery” and “a lot going
14 on” during that time and “so a lot of things are kind of a blur” to her. Dkt. 153,
15 Denneen Depo. at 106:3-13. And she admitted that “there could have been changes
16 in company policy and [she] wouldn’t have remembered it.” *Id.* Although
17 Denneen claimed that when she was hired as a DSR in 2013 (*i.e.*, two years before
18 Dykzeul’s interview) she had been told that Saturdays were optional, she did not
19 interview with Swift but rather with a different supervisor. *Id.* at 10:2-11:13, 16:6-
20 15. Denneen admitted that when Swift became her supervisor, he would “push
21 [them] and be like, you know, you got to work Saturdays.” *Id.* at 11:3-13.

22 **E. Other Accommodations Proposed By Dykzeul In This Proceeding**
23 **Also Would Have Imposed An Undue Hardship**

24 Dykzeul has proposed other, theoretical accommodations in this proceeding
25 that she contends could have been implemented to allow her to work as a DSR at
26 Charter. For example, she has suggested Charter could have (1) hired another
27 employee to cover her Saturday shifts, (2) allowed other DSRs to sell in her
28 territory on Saturdays, or (3) allowed Dykzeul to have worked a reduced schedule.

1 Although Swift never considered it at the time, he explained that hiring a
2 part-time employee to cover Dykzeul's Saturday shifts would not have been a
3 feasible solution because of the expense of hiring, training and ramping up another
4 employee, the need to revamp the entire commissions structure, and the difficulties
5 associated with having a part-time employee who would not have the benefit of
6 participating in the weekday group DSR calls, during which significant on-the-job
7 training takes place. 7/21/21 Trial Tr. at 227:16-229:14. More importantly, Charter
8 did not have any part-time DSR positions and did not hire people part-time for the
9 job. 7/21/21 Tr. at 231:16-232:20. In effect, Charter would have to create an
10 entirely new position (part-time, one-day-a-week DSR), find and hire someone who
11 would be good at the position, and figure out how to manage and incentivize the
12 position. In other words, more than a de minimis burden.

13 Swift also did not consider having another DSR cover Dykzeul's territory for
14 her on Saturdays because the other DSRs already had their own territories to cover
15 and doing so would undermine Charter's entire territory assignment and rotation
16 system. 7/21/21 Tr. at 229:15-230:4. Such a reassignment would also decrease
17 Dykzeul's compensation by reducing the number of commissions she could earn,
18 given that another DSR would also be selling to her assigned territory. *Id.* Such a
19 change would also encourage DSRs to sell in other DSRs' territories, pitting DSRs
20 against each other and undermining the entire system that Charter employed. *Id.* at
21 230:5-231:12. Finally, the evidence at trial showed that, under the current
22 schedule, DSRs were just able to cover their monthly territory. *See, e.g.*, 7/20/21
23 Trial Tr. at at 80:17-81:2 (Blond needed to work Saturdays just to cover his existing
24 territory). Adding more addresses to someone's territory for one day each week
25 would not be feasible and would impose more than a de minimis burden on those
26 other employees and on Charter.

27 ///

28 ///

1 F. **Dykzeul's Subsequent Employment History Shows That She Was**
2 **Unlikely To Work At Charter Long, Even If She Had Been Hired**
3 **As A DSR**

4 After Dykzeul interviewed for the Charter DSR position on October 15,
5 2015, she obtained subsequent employment as follows:

- 6 • In the same month, October 2015, she accepted a part-time job with AppStar
7 Financial “selling leases for payment processing machines to businesses.”
8 Dkt. 142, ¶ 19.
- 9 • In March 2016, she quit AppStar and started working for Heartland Payment
10 Systems full time as an outside salesperson, also selling payment processing
11 machines to businesses. Dkt. 142, ¶ 21.
- 12 • In August 2016, she quit Heartland, a full-time position, to take a part-time
13 position with Life Alert as an inside salesperson selling emergency life-
14 saving response buttons to seniors. Dkt. 142, ¶ 22. In the approximate 13
15 months that Dykzeul worked for Life Alert, she made approximately \$70,000
16 in commissions on part-time hours (about \$64,000 a year). *Id.*
- 17 • In October 2017, she quit Life Alert and accepted a full-time sales position
18 with Patient Care America selling dialysis products to patients. Dkt. 142, ¶
19 23. Patient Care paid her a \$70,000 annual base salary plus commission and
20 benefits. *Id.*
- 21 • In April 2018, Patient Care America terminated her employment. Dkt. 142, ¶
22 23.
- 23 • Dykzeul thereafter decided to start selling insurance, and she took the
24 California Life and Health insurance exam in July 2018. Dkt. 142, ¶ 24. On
25 August 31, 2018, she became a licensed insurance agent to sell life and
26 health in insurance in California. *Id.*
- 27 • In October 2018, she went to work with Millennia Tax Relief. Dkt. 142, ¶
28 25.

///

- 1 • In December 2018, she left Millennia Tax Relief and started working with
2 two other companies, Aflac and Mass Mutual. Dkt. 142, ¶ 26.
- 3 • Finally, in February 2019, she accepted a full-time sales position with a
4 company called Goldco selling gold and silver. Dkt. 142, ¶ 27.

5 This record alone shows that Dykzeul was a serial job-hopper who never
6 stayed in one job for long and was always looking for the next opportunity. Nor
7 was her job-hopping limited to the period after Dykzeul interviewed at Charter; her
8 prior employment history shows more of the same. Aukstikalnis analyzed
9 Dykzeul's complete employment history, and determined that:

- 10 • For jobs held by Dykzeul since 1996, her average length of employment was
11 1.21 years.
- 12 • For jobs held since 2011, her average length of employment was 0.71 years
13 (8.6 months).
- 14 • From October 2015 to the time of trial, she held eight different jobs, with an
15 average job length of 0.67 years (8 months).

16 Dkt. 143 at 9:2-8.

17 Dykzeul may have felt she had good reason to keep changing jobs, but her
18 frequent job changes suggest her experience at Charter also would have been short-
19 lived, particularly if she came into the job expecting it to be easy and that she was
20 going to make \$100,000-plus a year, as she has claimed in this proceeding. Based
21 on other new DSR's real-world experiences and Dykzeul's own employment
22 history, the most likely scenario is that Dykzeul would have quickly been
23 disappointed working at Charter and moved on to another job, just like she has
24 done everywhere else. Based on this evidence alone, there is no reason to believe
25 that Dykzeul would have worked for Charter in Turlock—a known difficult
26 territory and in a job with high a turnover rate and where 73% of employees lasted
27 less than 9 months—for *four years*, let alone until retirement, as Dykzeul claims in
28 this lawsuit.

1 However, the evidence got worse for Dykzeul at trial, particularly with
2 respect to one of her subsequent employers, Patient Care. At trial, Dykzeul testified
3 that, in April 2018, she voluntarily left a successful position at Life Alert to pursue
4 what she believed was a better opportunity at Patient Care. 7/21/21 Trial Tr. at
5 317:2-7. Patient Care provided a base annual salary of \$70,000 plus commissions
6 and full benefits. *Id.* at 317:8-14; Dkt. 142, ¶ 23.

7 Dykzeul's tenure at PCA began with a 90-day probationary period. 7/21/21
8 Trial Tr. at 317:15-19. Contrary to her claims of having been a star employee
9 everywhere she went, her probationary period at PCA was extended by an
10 additional thirty days. *Id.* at 317:20-22. Although Dykzeul professed at trial not to
11 recall why Patient Care extended her probationary period, in truth it was extended
12 because Patient care determined she required extra training. 7/21/21 Tr. at 317:20-
13 318:6; Dkt. 158, 7/22/21 Trial Tr. at 10:13-18, 27:17-21.

14 Dykzeul also tried to avoid answering questions about various training and
15 counseling she received at Patient Care, ultimately testifying that she could not
16 remember whether she had received counseling at Patient Care about lack of
17 product knowledge or having trouble remembering names. 7/21/21 Tr. at 318:15-
18 319:15. Although Dykzeul admitted that she was let go from Patient Care, she
19 denied at trial that it was for performance reasons and claimed she was
20 "[a]bsolutely" certain that she was never given a reason for her termination despite
21 asking for one:

22 Q. Didn't she [Indira Seonne, Patient Care's HR director] tell
23 you that you were being let go for performance problems?

24 A. No.

25 Q. And you're certain of that?

26 A. Absolutely. I asked. I never got an answer.

27 7/21/21 Trial Tr. at 319:25-320:18.

28 ///

1 Dykzeul also denied having any problems meeting her sales targets at Patient
2 Care. 7/21/21 Tr. at 320:19-321:11.

3 Patient Care's then-HR Director, Indira Seoane, testified at trial, exposing
4 Dykzeul's false claims about her time at Patient Care. Seoane testified that she was
5 the one who informed Dykzeul of her termination, and that Seoane specifically
6 informed Dykzeul that she was being terminated for poor performance:

7 Q: Do you recall – well, were you involved in the decision to
8 terminate Ms. Dykzeul's employment?

9 A: Yes.

10 Q: Do you recall the reason why her employment was
11 terminated? Why was it terminated?

12 A: Due to performance.

13 ...

14 Q: Did you – were you involved in the process of informing
15 Ms. Dykzeul about her termination at all?

16 A: Yes.

17 Q: How so?

18 A: I was the one that did her termination.

19 Q: And how was the information conveyed to Ms. Dykzeul?

20 A: It was via a conference call because we are all in different
21 states. . . . And I informed Teresa that her employment
22 **was being terminated as of April 30th, 2018, due to**
23 **performance.**

24 ...

25 Q: Okay. And now did you specifically inform her the reason
26 during that call why her employment was being
27 terminated?

28 A: Yes.

Q: And that it was being terminated for performance
reasons?

A: That's correct.

Dkt. 158, 7/22/21 Trial Tr. at 7:8-13, 19:23-20:21.

1 Seoane was asked what about Dykzeul's performance led to her termination,
2 and she explained that Dykzeul's supervisor, who had just spent some time
3 shadowing Dykzeul visiting clinics, reported that Dykzeul was not prepared for
4 meetings, made inappropriate comments, and did not have product knowledge.
5 Dkt. 158, 7/22/21 Trial Tr. at 11:14-15:25. Trial Exhibit 55, an email thread
6 between Dykzeul's then-supervisor and Seoane documented the numerous
7 problems Dykzeul's supervisor experienced with Dykzeul's performance. Dkt.
8 165, TE 55, pp. 11-14. Notably, the Court admitted an unredacted version of Trial
9 Exhibit 55 over Dykzeul's objections. *See* Dkts. 164 and 166. Previously, Dykzeul
10 had attempted to hide these documents from the Court and Charter by redacting
11 them. *See* Dkt. 164 ("Numerous exhibits in the Court's exhibit binder consist of
12 totally redacted pages.").

13 In the email that was admitted as Trial Exhibit 55, Dykzeul's supervisor
14 summarized her experience with Dykzeul:

15 This was our last visit of the day at which point we returned
16 to the car where I expressed my concerns with Teresa's
17 lack of planning, preparation and clinical knowledge.
18 Teresa replied that she was not surprised about her vast
weaknesses and that she was excited to be able to "learn
from me".

19 In summary, I'm gravely concerned about Teresa's ability
20 to be successful in her role which I believe is negatively
21 impacting our business in Southern California. Based on
22 my observations, Teresa is not perceived as a competent
and trusted resource but rather as someone who is
'confusing and difficult' and in my opinion, clinically
incompetent.

23 At trial, Seoane also explained that the 90-day performance evaluation
24 Dykzeul misleadingly described as "great" in her trial declaration actually showed
25 that Dykzeul's performance up to that point was underwhelming. Dkt. 158, 7/22/21
26 Trial Tr. at 7:14-10:25, 24:11-21, 27:17-21, 40:3-23; TE 27. Dykzeul had zero
27 "starts" while her 90-day goal was *four*, and she only had 17 "referrals" while
28 Seoane estimated that the average representative brought in *over 50* a week. *Id.* As

1 Seoane put it, Dykzeul's 17 referrals was "a very low number" indicative of "poor
2 performance." *Id.* In short, Dykzeul's job history after her interview with Charter
3 completely undermines her contention that she would have been a long-term,
4 superstar performer at Charter if she had only gotten the DSR job.

5 **IV. LIABILITY**

6 **A. Legal Framework**

7 Dykzeul asserts both intentional and failure to accommodate religious
8 discrimination claims under Title VII of the Civil Rights Act of 1964 ("Title VII")
9 and the California Fair Employment and Housing Act (the "FEHA"). Although
10 there are slight differences in nomenclature, Title VII and the FEHA prohibit the
11 same things.

12 An employer violates both statutes if it makes an adverse employment
13 decision "because of" an employee or applicant's religion, religious beliefs, or
14 religious practice. 42 U.S.C. § 2000e-2(a); Cal. Gov't Code § 12940(a). A
15 violation of both statutes also occurs if an employer fails to reasonably
16 accommodate a religious practice or observance that it could have without undue
17 hardship. 42 U.S.C. § 2000e(j); Cal. Gov't Code § 12940(l).

18 The analyses of Dykzeul's Title VII and FEHA claims are the same. *See,*
19 *e.g., Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) (applying
20 Title VII precedent to plaintiff's state law FEHA claim in a religious
21 accommodation case); *Madsen v. Associated Chino Tchrs.*, 317 F. Supp. 2d 1175,
22 1180 (C.D. Cal. 2004) ("Where a plaintiff alleges discrimination based on religion,
23 a court may rely on federal Title VII law alone.").¹

24 ¹ As the Court recognized in its summary judgment order:

25
26 The analysis of a religious discrimination claim is the same
27 under FEHA and Title VII. California courts have observed
28 that "[a]lthough the wording of [T]itle VII differs in some
particulars from the wording of FEHA, the antidiscriminatory
objectives and overriding public policy purposes of the two acts
are identical." Therefore, "California courts apply the Title VII

1 **B. Charter Could Not Accommodate Dykzeul's Inability To Work**
2 **All Saturdays Without Undue Hardship**

3 Dykzeul insists that Charter needed to excuse her from having to work Friday
4 evenings and Saturdays entirely, reduce her sales targets and performance
5 expectations, and allow her to work a reduced work schedule of Monday through
6 sundown Friday to satisfy its duty to accommodate. Alternatively, she contends
7 that Charter could have accommodated her by either letting her make up her Friday
8 evening and Saturday hours on Sundays or letting her work longer hours on the
9 weekdays.

10 Under both Title VII and the FEHA, a claim for failure to accommodate
11 religious beliefs fails if an employer “show[s] *either* that it initiated good faith
12 efforts to accommodate reasonably the employee’s religious practices *or* that it
13 could not reasonably accommodate the employee without undue hardship.” *Tiano*
14 *v. Dillard Dep’t Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998) (emphasis added);
15 *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.*, 122
16 Cal.App.4th 1004, 1011 (FEHA) (“Once the employee establishes a prima facie
17 case with sufficient evidence of the three elements, the burden shifts to the
18 employer to establish that ‘it initiated good faith efforts to accommodate *or* no
19 accommodation was possible without producing undue hardship’ ”) (emphasis
20 added).²

21 Undue hardship is determined “on a case-by-case basis.” *Berry v. Dep’t of*
22 *Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006). “[A]n accommodation causes
23 ‘undue hardship’ whenever that accommodation results in ‘more than a *de minimis*

24 _____ framework to claims brought under FEHA.” The Court
25 therefore analyzes Plaintiff’s discrimination claims under Title
26 VII and FEHA together.
26 (citations omitted).

27 ² Dykzeul incorrectly suggests in her brief that an employer must prove that it made
28 *both* a good faith effort to accommodate *and* that any proposed accommodation
 would cause undue hardship.

1 cost' to the employer.” *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67, 107 S.
2 Ct. 367, 371, 93 L. Ed. 2d 305 (1986) (citing *Trans World Airlines, Inc. v.*
3 *Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 2269, 53 L. Ed. 2d 113 (1977)).³ Courts
4 have observed that undue hardship “is not a difficult threshold to pass.” *Webb v.*
5 *City of Philadelphia*, 562 F.3d 256, 260 (3d Cir. 2009).

6 The Ninth Circuit has held that undue hardship can come in the form of
7 “higher wages” or “additional costs in the form of lost efficiency.” *Opuku-Boateng*
8 *v. State of Cal.*, 95 F.3d 1461, 1468 (9th Cir. 1996) (internal citations omitted).
9 Thus, “[t]he cost of hiring an additional worker or the loss of production that results
10 from not replacing a worker who is unavailable due to a religious conflict can
11 amount to undue hardship.” *Lee v. ABF Freight System, Inc.*, 22 F.3d 1019, 1023
12 (10th Cir. 1994).

13 Costs to the employer are not the only means by which undue hardship can
14 be established. Rather, “[a]n employer may prove that an employee’s proposal
15 would involve undue hardship by showing that *either* its impact on coworkers *or* its
16 cost would be more than de minimis.” *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d
17 1382, 1384 (9th Cir. 1984) (emphasis added); *see also Balint v. Carson City, Nev.*,
18 180 F.3d 1047, 1054 (9th Cir. 1999) (en banc) (“Undue hardship may also be
19 present when an accommodation would cause more than a de minimis impact on
20 coworkers[.]”); *accord Harrell v. Donahue*, 638 F.3d 975, 980 (8th Cir. 2011)
21 (“[A]n accommodation creates an undue hardship if it causes more than a de
22 minimis impact on co-workers.”) (internal citations omitted). While coworker
23 “grumbling or unhappiness” is insufficient, “actual imposition on co-workers or
24 disruption of the work routine” can constitute undue hardship. *Burns v. S. Pac.*
25 *Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978); *see also EEOC v. Firestone Fibers*

26 ³ Under the FEHA, “undue hardship” is defined as an “action requiring significant
27 difficulty or expense” considered in light of, among other factors, “the nature and
28 cost of the accommodation needed,” and “the type of operations, including the
composition, structure, and functions of the workforce” Cal. Gov’t Code
§ 12926(u).

1 & *Textiles Co.*, 515 F.3d 307, 317 (4th Cir. 2008) (“[A]n employer is not required
2 to accommodate an employee’s religious need if it would impose personally and
3 directly on fellow employees.”).

4 The costs of providing a proposed accommodation need not be “quantifiable”
5 so long as they are “present and real.” *Cook v. Chrysler*, 981 F.2d 336, 339 (8th
6 Cir. 1992). Moreover, “Title VII does not require an employer to actually incur
7 accommodation costs before asserting that they are more than de minimis.” *Bruff v.*
8 *N. Mississippi Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001); *Virts v.*
9 *Consol. Freightways Corp. of Delaware*, 285 F.3d 508, 519 (6th Cir. 2002) (“[A]n
10 employer does not have to actually experience the hardship in order for the hardship
11 to be recognized as too great to be reasonable.”).

12 Dykzeul’s proposed accommodations are unreasonable and would have
13 caused undue hardship. First, excusing Dykzeul from having to work all Friday
14 evenings and all Saturdays would have caused Charter to incur more than de
15 minimis costs; Charter would have had to operate with one less DSR during those
16 key hours, resulting in lost efficiencies in the form of lost production, missed sales
17 opportunities, and having to restructure its entire territorial assignment and rotation
18 system. Second, Dykzeul’s proposal to work Sundays instead of Saturdays (or her
19 attorneys’ suggestion of longer hours on the weekdays) would have negatively and
20 directly imposed upon her supervisor; Swift would have been forced to work
21 additional days and hours on a permanent basis that he otherwise was not required.

22 *I. Working Saturdays Was A Requirement For DSRs In October*
23 *2015 When Dykzeul Applied*

24 Dykzeul contends that Charter’s Saturday work requirement when Dykzeul
25 applied. But the only competent evidence on this point is the testimony of Swift
26 and Prunty, the only trial witnesses that held positions at Charter who had personal
27 knowledge about Charter’s policies and requirements in October 2015.

28 Swift testified that working Saturdays was unequivocally required in October

1 2015 and explained that the reason was because, historically, it was “the best
2 production day of the week.” 7/20/21 Trial Tr. at 150:15-22; 7/21/21 Trial Tr. at
3 215:20-216:2. Swift explained, moreover, that the requirement was a directive that
4 came from his sales manager, not something that he made up like some sort of
5 rogue supervisor Dykzeul would have the Court believe. *Id.* at 218:7-12.

6 Swift’s testimony is corroborated by Prunty, who was an in-house recruiter
7 for DSRs and screened Dykzeul over the phone. At her deposition, Prunty testified:

8 Q: Okay. And when you say that you go over the requirements [of the DSR
9 position] during the prescreening, are you re-asking them the exact questions that
10 are in the profile?

11 A: No.

12 Q: Okay, so you’re asking them different questions?

13 A: No. I’m just not asking them the questions that are exactly in the profile.
14 What I do is I state what the requirements are, and I ask them are they okay with
15 them, because they already answered them in there that they were, but I’m just
16 going over it again with them. It’s more of a conversation instead of a
17 question/answer.

18 Q: Okay. So you don’t ask them verbatim each question that they already
19 answered in the profile?

20 A: I state what the requirements are for the position, which includes the
21 questions in the profile, and I ask them are they okay with that, and they answer
22 “yes” or “no.”

23 Q: In regards to the hours, what specifically do you state to them the
24 requirement is?

25 A: That it’s required that they work evenings and Saturday.

26 Q: Okay, so you specifically tell them Saturdays?

27 A: Yes.

28 Q: And who told you to say “Saturdays” instead of “weekends”?

1 A: I – that’s how I was trained because that’s the requirements of the
2 position.

3 Dkt. 148, Prunty Dep. at 32:21-34:1.

4 Swift’s and Prunty’s testimony credibly establish that DSRs were required to
5 be available to work Saturdays at the time of Dykzeul’s application. As a sales
6 supervisor, of course, Swift knew what days Charter required DSRs to be available
7 to work. He held a management position and his responsibilities included
8 supervising, interviewing, and hiring DSRs. Prunty, a recruiter, was likewise privy
9 to what days DSRs worked because she was responsible for reviewing applications
10 and screened candidates to ensure that those who interviewed met the minimum
11 requirements, including the ability to work Saturdays. The two of them were in
12 managerial and human resources positions, and both had personal knowledge about
13 the relevant company policies and requirements for DSRs.

14 Dykzeul also attempts to dispute that working Saturdays was required in
15 2015 with the anecdotal experiences of three former DSRs – Krystyna Amaral,
16 Daniel Blond, and Neila Denneen – who worked under Swift at various times.

17 Two of them, Amaral and Blond, didn’t start working for Charter until more
18 than two years after Dykzeul applied and thus have no relevant personal knowledge
19 about what the schedule requirements were in October 2015. Moreover, whatever
20 personal knowledge they do have actually confirms that Charter expected and
21 required its DSRs to work Saturdays. Blond testified that Swift told him during his
22 interview that DSRs worked “Monday through Friday from 11:00 a.m. to 8:00 p.m.
23 and then on Saturdays from 9:00 to 3:00, and with me that wasn’t an issue.”
24 7/20/21 Trial Tr. at 45:10-23. Amaral similarly testified that Swift told her during
25 her interview that DSRs worked Monday through Friday and Saturdays. *Id.* at
26 91:23-92:4.

27 The third, Denneen, was hired and managed by someone else until Swift
28 became her supervisor around the end of her time with Charter in 2016. Dkt. 153,

1 Denneen Dep. at 10:2-11:13, 16:6-15. And although she testified at her deposition
2 that whoever hired her *in 2013* told her working Saturdays was optional, that was
3 approximately two years before Dykzeul applied to Charter, and she acknowledged
4 that after Swift became her supervisor (right around the time Dykzeul applied) that
5 he would “push” her to work Saturdays, like “you got to work Saturdays.” *Id.*
6 Finally, Denneen testified she had “major surgery” while she was employed at
7 Charter and that she had “a lot going on, so a lot of things are kind of a blur” to her.
8 *Id.* at 106:3-13. In light of Denneen’s testimony that when Swift became her
9 supervisor, he pushed her to work Saturdays, and that her recollection of matters
10 from that time period are a “blur,” her testimony actually reinforces that working
11 Saturdays was expected and required at the time of Dykzeul’s application.

12 In sum, the credible testimony of Charter’s management and human
13 resources personnel establishes that DSRs were required to work Saturdays when
14 Dykzeul applied for the position. The speculative and subjective beliefs of non-
15 management employees, two of whom weren’t even employed when Dykzeul
16 applied, do not convincingly call into question that requirement.

17 2. *Exempting Dykzeul From Working Friday Evenings and*
18 *Saturdays and Adjusting Her Performance Goals Would Have*
Resulted in Lost Efficiencies

19 Dykzeul first proposes that Charter could have excused her from having to
20 work all Friday evenings and all Saturdays entirely, adjusted her performance
21 expectations, and allowed her to work a reduced four-and-a-half-day schedule. But
22 this accommodation obviously would have resulted in lost production and missed
23 sales opportunities.

24 Addressing “the extent of [a]n employer’s obligation under Title VII to
25 accommodate an employee whose religious beliefs prohibit him from working on
26 Saturdays,” 432 U.S. at 66, the Supreme Court in *Hardison* held that the employer
27 was not required to permit the plaintiff to work a four-day week when necessary in
28 order to avoid Saturday shifts so that he could observe the Sabbath. If the employer

1 did not replace the plaintiff it would be left short-handed during the weeks that the
2 plaintiff did not work Saturday, and the alternatives of pulling personnel from other
3 departments to fill in for the plaintiff or paying premium wages to employees not
4 scheduled but willing to work involved costs to the employer “either in the form of
5 lost efficiency in other jobs or higher wages.” *Id.* at 84. Each alternative, the
6 Supreme Court concluded, would amount to undue hardship because the employer
7 would be required to “bear more than a de minimis cost.” *Id.* at 84.

8 Applying the Supreme Court’s holding and rationale in *Hardison*, Dykzeul’s
9 proposal that she simply be excused from working Saturdays would involve more
10 than de minimis costs to Charter and cause undue hardship. At the time of
11 Dykzeul’s application, Charter required and expected its DSRs to work six days a
12 week, Monday through Saturday. The requirement that DSRs work Saturdays was
13 not arbitrary. First, Saturdays were generally the most productive day of the week.
14 Second, it was important for DSRs to work Saturdays to increase the chances of
15 reaching all decision makers in a particular household, and of reaching certain
16 segments of the population that are usually not home during the usual hours that
17 DSRs worked on the weekdays, such as people who work unconventional hours
18 Monday through Friday. As sales supervisor Swift explained at trial:⁴

19 Q: In the October 2015 time period, was availability to work on
20 Saturdays a requirement for DSRs who reported to you?

21 A: Yes.

22 Q: Why was that?

23 A: Because Saturday typically was, throughout history in this
24 business, since I’ve been in the business, Saturday was the best
25 production day of the week.

26
27 ⁴ Swift has extensive experience – over 30 years – in door-to-door sales in the cable
28 industry as a sales representative and supervisor, at Charter and with other
companies including for period of time his own business.

1 Q: And with respect to the Saturday work, what was your
2 concern there?

3 A: Well, again, Saturdays, are really the most productive day of
4 the week. If we don't work Saturdays, there are people we'll
5 never contact and there are lost sales that I don't believe, if
6 you're working the proper hours on Monday through Friday, I
7 don't believe you're going to make it up.

8 . . .

9 Q: In your experience, did you find that within a group of – let's
10 say – 400 addresses, that the people who were likely to be home
11 differed between, say, during the weekday, during the weekday
12 evening, and during a weekend?

13 A: Yes.

14 Q: And could you explain?

15 A: There are people that maybe they're out of town during the
16 weekdays, maybe they have a job out of town and they come
17 home on the weekends. First of all, it's very difficult to contact a
18 hundred percent of your leads. I don't think anyone ever did it.
19 But during the weekdays, you have – roughly, we had three to
20 four hours of really productive time, that's the evenings [sic]
21 time, to really contact decision-makers. You can't get to all your
22 leads in five days. So Saturday, Saturday morning, Saturday
23 evenings, you found that you did contact those people that lived
24 in the addresses that are habitually not home.

25 The exact reasons why we couldn't seem to catch them on the
26 weekdays, I don't know exactly why. But I'm sure there are a
27 number of variables.

28 . . .

29 Q: Okay. So in your experience were there some customers who
30 are more likely to be available and contacted on a Saturday than
31 they were other days of the week?

32 Mr. Cherne: Same objections.

33 The Court: Well, I want to hear the answer but I don't –

1 (laughing).

2 The Witness: Well, you're more likely, because people – most
3 people work a five-day workweek, you're more likely to contact,
4 if it's a married couple or roommate situation, you're just more
5 likely to contact both decision-makers or all decision-makers in
6 that address.

7 And that's really what you – that's really what you want. You
8 don't want the case to where you contact the husband and he
9 defers: Gee, I can't do anything until I talk to my wife. So it
10 accelerates the closing process if all the decision-makers in the
11 home are home at the time you contact them.

12 7/21/21 Trial Tr. at 213:14-215:8, 215:20-216:2, 225:9-18.

13 Put simply, the job of DSRs is to sell. If Charter excused Dykzeul from *ever*
14 having to work Friday evenings or Saturdays, it necessarily meant that Swift's team
15 would have had to operate indefinitely with one less DSR on Saturdays. Naturally,
16 a salesperson who works five days a week knocks on fewer doors, and follows up
17 on fewer leads, than if he or she worked six days a week. Fewer doors knocked
18 means fewer contacts with prospective customers, which are critical to making
19 sales. The loss in productivity and missed sales opportunities that would result
20 from Dykzeul working a permanently reduced schedule is self-evident.

21 Accordingly, Dykzeul's suggestion that Charter simply excuse her from *ever*
22 having to work a Friday evening or Saturday, when no other DSRs received the
23 same guarantee, is an unreasonable accommodation that would have caused a more
24 than de minimis burden on the conduct of Charter's business.⁵

25 ⁵ Moreover, if Charter permanently excused Dykzeul from ever having to work
26 Friday evenings and Saturdays, it would be treating her more favorably than other
27 DSRs solely because of her religious beliefs. She would never have to work Friday
28 evenings or Saturdays, while other DSRs were expected and scheduled to work.
No other DSRs requested, or received, *every* Friday evening or Saturdays off. The
Ninth Circuit has stated that *Hardison* bars “‘preferential treatment of employees’
” on account of religion. *Opuku-Boateng*, 95 F.3d at 1469-70 (9th Cir. 1996)
(quoting *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981)).
An accommodation that would completely exempt Dykzeul from one day of work

3. *Dykzeul Could Not Work Sundays Instead Of Saturdays Without Undue Hardship Because Her Supervisor Would Have To Work On His Only Day Off*

Dykzeul next proposes that Charter should have accommodated her by permitting her to work Sundays instead of Saturdays. But doing so would have caused a real and actual imposition upon Swift, who would have to work seven days a week without a day off.

It is undisputed that Swift worked six days a week, Monday through Saturday, at the time of Dykzeul's application and that he would have to be on call Sundays – and thus work seven days a week – if Dykzeul worked Sundays instead of Saturdays. 7/21/21 Trial Tr. at 225:16-227:12. Also undisputed is the fact that Swift needed to be on call and, at a minimum, available by phone to answer any questions and address any issues that might arise when DSRs were out in the field, including responding when necessary to any accidents or incidents that they might be involved in. *Id.* at 205:22-209:6, 211:7-16.

Swift testified that he received calls from DSRs for a variety of reasons, including upset customers, technicians that missed an installation appointment with customers, pricing issues, and questions about the product or competitors. 7/21/21 Trial Tr. at 205:22-208:16. He received numerous calls from DSRs, sometimes five to ten a day. *Id.* There were also occasions as a supervisor for Charter when Swift had to respond to situations involving injury to his DSRs. *Id.* When DSRs were injured on the job, Swift had to take them to the urgent care or meet them there, go to scene where the injury occurred to investigate and try to contact witnesses, and prepare and submit an accident report to human resources. *Id.* Each incident took several hours for him to do what he needed, depending on where they occurred. *Id.*

Because Swift was required to be on call whenever DSRs were in the field, _____
that other DSRs were expected and scheduled to work would amount to the very “preferential treatment” that the Ninth Circuit has said *Hardison* prohibits.

1 accommodating Dykzeul's request to work Sundays instead of Saturdays
2 necessarily meant that Swift would have to work seven days a week. Dykzeul
3 trivializes the significance of being on call and in doing so ignores the fact that
4 Sundays were Swift's only regular day off entirely free from any work obligations.
5 Swift often received calls from DSRs in the field regarding various issues and
6 sometimes even had to physically respond to a location, investigate, and prepare a
7 report when they got hurt. If Dykzeul worked a permanent Sunday schedule, Swift
8 would never have a day off completely free from work obligations and would be
9 restricted in the types of leisure activities he could engage in on Sundays.

10 This real and negative impact on Swift constitutes an undue hardship.
11 Where, as here, an employer would have to impose on an employee additional
12 responsibility to accommodate another employee's Sabbath observance, courts have
13 consistently held that accommodation need not be provided because undue hardship
14 would result. *See, e.g., Eversley*, 843 F.2d at 176. ("[I]t is unreasonable and an
15 undue hardship on an employer to require the employer to force employees, over
16 their express refusal, to permanently switch from a daytime to a nighttime shift in
17 order to accommodate another employee's different Sabbath observation.");
18 *Harrell*, 638 F.3d at 980 ("[I]f accommodating an employee's religious beliefs also
19 causes a 'real' and 'actual' imposition on co-workers, Title VII does not require an
20 employer to make such an accommodation."); *Chrysler Corp. v. Mann*, 561 F.2d
21 1282, 1285 (8th Cir. 1977) ("Nor do we think that an employer should have to
22 adjust its entire work schedule to accommodate individual religious preferences and
23 practices."); *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075, 1084-85 (N.D.
24 Tex. Mar. 5, 2003) (holding that employer established undue hardship where it was
25 undisputed another district manager or senior member of management had to give
26 up their weekend days off to cover the plaintiff during his Sabbath; "where . . . an
27 employer's accommodation would force other employees, against their wishes, to
28 modify their work schedules to accommodate the religious beliefs of a particular

1 employee, the same constitutes an undue hardship.”); *EEOC v. Dalfort Aerospace*,
2 *L.P.*, 2002 WL 255486, at *4 (N.D. Tex. Feb. 19, 2002) (“An accommodation that
3 would force other employees, against their wishes, to modify their work schedules
4 to accommodate the religious beliefs of the complaining employee would be
5 unreasonable and an undue hardship.”).

6 Relying on testimony from Blond and Amaral that they could work
7 occasional Sundays if they wanted, Dykzeul contends that letting her work Sundays
8 instead of Saturdays wouldn’t result in any hardship to Swift because he let other
9 DSRs work some Sundays. But that is comparing apples to oranges. As Swift
10 testified, DSRs occasionally worked a Sunday if they wanted to make some
11 additional income or were behind on their targets, but such instances were
12 “extremely rare”, and he could only recall it happening a few times over his seven
13 years with Charter. 7/20/21 Trial Tr. at 170:9-171:5; 7/21/21 Trial Tr. at 211:5-16.⁶
14 There is a stark difference between having to be on call an *occasional* Sunday,
15 which Swift was willing to do, and being forced to be on call *every* Sunday on an
16 indefinite and permanent basis, which Swift was unwilling to do. *See Eversley v.*
17 *MBank Dall.*, 843 F.2d 172, 176 (5th Cir. 1988) (“[I]t is unreasonable and an undue
18 hardship on an employer to require the employer to force employees, over their
19 express refusal, to permanently switch from a daytime to a nighttime shift in order
20 to accommodate another employee’s different Sabbath observation.”). The fact is
21 Swift earnestly wanted to hire Dykzeul and thought long and hard about working
22 seven days a week. That he ultimately concluded he would not be able to handle it,
23 after working six days a week for 30 years, is perfectly reasonable and
24 understandable. 226:6-227:12.

25
26
27
28 ⁶ Neither Blond nor Amaral testified at trial how many times or how often they
worked on a Sunday.

4. *Dykzeul Could Not Work Longer Hours On Weekdays Without Undue Hardship Because Charter Would Suffer Lost Efficiencies*

Lastly, Dykzeul suggests that Charter could have allowed her to work longer hours on weekdays instead of Saturdays. However, substituting prime hours when people are more likely to be home (Saturday) with unproductive hours (weekday mornings and late evenings) would have resulted in lost efficiencies and therefore undue hardship.

At the time of Dykzeul's application, DSRs worked 11 a.m. to 8 p.m. on weekdays (SF No. 8), which means that she would have to work in the early mornings before 11 a.m. and late in the evenings after 8 p.m. to make up her Saturday hours. But Swift and Dykzeul's own witness, Daniel Blond, explained at trial why there was no point to working in the mornings on the weekdays.

Swift explained that most people work Monday through Friday, and the best hours on weekdays to try and sell Charter's services were after people got home from work. 7/21/21 Trial Tr. at 201:12-23; 245:11-14. This observation was confirmed by Blond, who aptly testified:

Q: Okay. Now, although you were permitted to start working early on a given day, in your experience you didn't see the point of starting at 8:00 or 9:00 in the morning, did you?

A: I did I several times and saw no reflection of any more contacts during that time period because, like I said, normally more contacts you would have is after 3:00 p.m. You really, between 11:00 and 1:00 or 2:00, you're basically walking around half-empty neighborhoods. Everybody – the majority of everybody is, you know, working during the day. The working class people trying to save money are normally the ones you try to sell the most and so.

...

Q: And in your experience the main portion of DSR sales happen between 5:00 and 8:00 p.m. on the weekday?

1 A: Correct.

2 7/20/21 Trial Tr. at 72:3-73:5.

3 Blond also explained succinctly why working late into the evenings wasn't
4 practical: "Your contacts go far down once it starts getting dark outside." 7/20/21
5 Trial Tr. at 57:24-58:10.

6 It is common sense that people are generally more likely to be home on
7 Saturdays than on weekdays during normal work hours, more people are likely to
8 be home on weekdays after school and work, typically in the late afternoon and
9 early evening, and most people likely would not appreciate salespersons knocking
10 on their doors late at night. Charter required its DSRs to work Saturdays so that
11 they could reach portions of the population who are regularly not home on the
12 weekdays. 7/21/21 Trial Tr. 225:9-18. Substituting a DSR's prime hours on
13 Saturdays when people are more likely to be home with unproductive hours on the
14 weekdays at times when people are either less likely to be home (mornings) or less
15 receptive (late evenings) reduces the pool of potential customers with whom the
16 DSR makes contact. This loss in efficiency would have amounted to more than de
17 minimis cost and an undue hardship to Charter's conduct of its business.

18 C. **Charter Did Not Intentionally Discriminate Against Dykzeul**
19 **Because Of Her Religion Or Religious Beliefs**

20 Dykzeul's claim that Charter intentionally discriminated against her because
21 of her religion or religious beliefs is easily dispensed with because the record
22 clearly demonstrates that the decision not to hire Dykzeul was not motivated by any
23 discriminatory animus.

24 "[L]iability for disparate treatment hinges upon proof of discriminatory
25 intent." *Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO (AFSCME) v. State of*
26 *Wash.*, 770 F.2d 1401, 1406 (9th Cir. 1985). The parties have stipulated that:
27 (1) Swift thought Dykzeul had potential *and wanted to hire her*; (2) Swift was the
28 sole decision-maker concerning Dykzeul's employment application; (3) Swift

1 concluded that he couldn't accommodate Dykzeul by letting her work Sundays
2 instead of Saturdays because it would require him to work seven days a week; and
3 (4) the *only* reason Swift didn't hire Dykzeul was because she couldn't work on
4 Saturdays. SF Nos. 13, 14, 16, 17. These stipulated facts alone preclude any
5 finding of discriminatory motive behind the decision not to hire Dykzeul, and there
6 can be no contention that Swift had an improper motive or that his proffered reason
7 for not hiring Plaintiff was pretextual.

8 Dykzeul argues in her closing brief that "Swift plainly treated other DSRs
9 differently . . . because Dykzeul was unavailable on Saturdays due to her religion."
10 Not true. Swift did not hire Dykzeul because she was unavailable on Saturdays, not
11 because she was unavailable on Saturdays on account of her religion. In other
12 words, Swift did not care *why* Dykzeul couldn't work Saturdays, only that she
13 couldn't. Indeed, Swift testified that he interviewed other applicants in the past
14 who also stated that they were unavailable on Saturdays and he did not hire any of
15 those individuals. 7/21/21 Trial Tr. at 217:22-2189:6.

16 Dykzeul tries to persuade the Court that the decision not to hire her was the
17 result of intentional discrimination with the anecdotal and personal experiences of
18 three DSRs. But two of the DSRs, Blond and Amaral, were not hired until two or
19 more years after Dykzeul applied for the position and are thus not appropriate
20 comparators – i.e., their experiences are not evidence that similarly situated
21 individuals were treated more favorably *when Dykzeul applied* two or more years
22 prior. The third DSR, Denneen, was hired and managed by some other supervisor
23 until Swift became her supervisor, at which point Denneen acknowledged that
24 Swift impressed upon her that she had to work Saturdays. Dkt. 153, Denneen
25 Depo. at 11:3-13.

26 In short, Swift's decision was not motivated by Dykzeul's religion, but her
27 unavailability to never, ever – without exception – work a Saturday if she was
28 hired. Dykzeul has not identified a single "similarly situated" applicant who,

1 without exception, could never work a Saturday and yet was hired, and there is no
2 evidence of any other circumstances suggesting discriminatory animus, hostility, or
3 intent. The only reasonable conclusion that can be reached in this case, based on
4 the stipulated facts and evidence, is that Swift didn't hire Dykzeul was because she
5 couldn't work Saturdays. The reason she couldn't work Saturdays was completely
6 irrelevant to Swift. There was no discriminatory intent, and without discriminatory
7 intent there can be no intentional discrimination.⁷

8
9 ⁷ As the Court observed in its ruling on the parties' cross-motions for summary
judgment and partial summary judgment:

10 "[T]he Court is skeptical that Plaintiff will be able to succeed on her
11 disparate treatment theory. Plaintiff's claim fits more naturally
12 under the failure to accommodate rubric and it would be superfluous
13 if the same facts supported liability under Title VII for both failure
to accommodate and disparate treatment." Dkt. 64 pp. 17-18.

14 The Court ultimately denied summary judgment on Dykzeul's intentional
15 discrimination claim because it believed that she submitted sufficient evidence to
16 raise a triable issue whether Charter's proffered explanation why Dykzeul was not
17 hired was pretextual. In particular, the Court found that Dykzeul's evidence, at the
summary judgment stage, was "sufficient to call into question whether 'the
[Saturday] work rule applies to all employees[.]' "

18 At the time, the parties had not yet stipulated for purposes of trial that *the only*
19 reason Swift did not hire Dykzeul is because she could not work Saturdays. Again,
20 given the parties' stipulation, Dykzeul cannot show pretext.

21 Moreover, whether working Saturdays was actually required, a disputed fact in this
22 case, has no bearing on the question of discriminatory intent. Swift's true reason
23 for not hiring Dykzeul, if nondiscriminatory, need not have been an actual work
24 requirement. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 358 (2000). This is
25 because "a plaintiff in a discrimination case must show discrimination, not just that
26 the employer's decision was wrong, mistaken, or unwise." *Veronese v. Lucasfilm*
27 *Ltd.*, 212 Cal. App. 4th 1, 21 (2012). Thus, "an employer may fire an employee for
28 a good reason, a bad reason, a reason based on erroneous facts, or for no reason at
all, as long as its action is not for a discriminatory reason." *Arteaga v. Brink's, Inc.*,
163 Cal. App. 4th 327, 344 (2008). "[T]he ultimate issue is simply whether the
employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons .
. . in this context are reasons that are *facially unrelated to prohibited bias*, and

1 **V. DAMAGES**

2 Dykzeul seeks back pay, emotional distress damages, and punitive damages.
3 If the Court finds for Dykzeul on any of her claims, it should: (1) calculate back pay
4 using the average of Turlock DSR earnings for the three-year period after her
5 application to estimate what her earnings would have been had Charter hired her;
6 (2) adopt Charter's expert Aukstikalnis' valuation method for lost benefits; (3) find
7 that Dykzeul fully mitigated her economic losses by 2017; (4) find that Dykzeul's
8 right to back pay terminated no later than October 31, 2017, when she found a
9 higher-paying substantially equivalent sales position with Patient Care; (5) find that
10 Dykzeul failed to exercise reasonable care to maintain substantially equivalent
11 employment when her performance led to Patient Care terminating her employment
12 for cause; (6) find that Dykzeul is entitled to only minimal damages, if at all, for
13 garden variety emotional distress because there is no evidence that she suffered any
14 serious emotional harm as a result of not getting the DSR job; and (7) find that the
15 evidence in this case does not support an award of punitive damages.

16 **A. Back Pay**

17 *1. Dykzeul's Post-Charter-Application Earnings*

18 After Dykzeul interviewed for the Charter DSR position on October 15,
19 2015, she obtained subsequent employment as outlined in Section III.F. above. The
20 parties have stipulated to Dykzeul's post-Charter-application earnings and value of
21 benefits for the period October 2015 through the first six months of 2021 as follows
22 (SF Nos. 20-38):

23

Year	Total Earnings	Value of Earnings Plus Benefits
24 2015	AppStar: \$2,823	\$2,823

25

26 _____
27 which, if true, would thus preclude a finding of *discrimination*.” *Guz*, 24 Cal. 4th at
28 358 (citation omitted) (emphasis in original).

2016	AppStar: \$7,865.17 Heartland: \$10,991.72 Life Alert: \$8,087.50 Total: \$26,944.39	\$26,944.39
2017	Life Alert: \$58,849.00 Patient Care: \$10,769.24 Total: \$69,618.24	\$71,449.01
2018	Patient Care: \$26,301.10 National Debt: \$738.56 Millenia Tax: \$800.00 Aflac: \$1,264.11 Total: \$29,103.77	\$33,574.96
2019	Goldco: \$39,680.28	\$46,534.05
2020	Goldco: \$120,466.83	\$140,946.19
2021 (through first 6 months)	Goldco: \$179,361.50	n/a

2. *Average Turlock DSR Earnings Should Be Used To Estimate Dykzeul's Lost Earnings, Not Puffery From A Job Advertisement As Advocated By Her Expert In His First Two Damages Models*

Estimating economic loss in a failure-to-hire case is inherently speculative. Even more so when, as here, potential earnings are not based on a fixed salary or hourly rate but a base salary plus commissions. Commissions invariably depend on sales and performance, and not having ever done the job, it is impossible to know how an applicant would have performed if he or she had been hired.⁸

The Court should use the average of Turlock DSR earnings for the three-year period after Dykzeul's application to estimate her lost earnings. Charter's expert, Amy Aukstikalnis, analyzed the earnings data for the 29 Turlock DSRs that worked between October 2015 and October 2018 and calculated their average annual earnings. After trial, Dykzeul raised new objections to Trial Exhibit 35, the

⁸ That Dykzeul asks the Court to award two different amounts for lost earnings that differ by nearly \$200,000 just goes to show how speculative are her economic damages.

1 compensation data relied upon by Aukstikalnis and Dykzeul's expert, Nutten, in his
2 third damages model. *See* Dkt. 155. Charter thereafter produced an updated
3 version of Trial Exhibit 35, with more complete data (the prior version had included
4 all base pay and commissions, but inadvertently omitted certain bridge payments
5 and paid time off, among other types of non-base, non-commission compensation),
6 and produced witness Martin Armstrong per the Court's order for deposition (Dkt.
7 164), where he authenticated the updated version of Trial Exhibit 35 and was
8 available for cross-examination. Dkt. 173-2, Banks Decl. ¶¶ 3-9, Ex. C (Updated
9 Trial Exhibit 35); Ex. D (Armstrong Dep. at 32:24-33:3, 34:11-36:22).

10 Aukstikalnis has now reviewed the updated and complete data in updated
11 Trial Exhibit 35 and updated her calculations from trial accordingly. Her
12 Supplemental Trial Declaration, which maintains the same opinions but includes
13 her updated calculations, is being filed concurrently with this brief as an exhibit.
14 *See* Dkt. 173-1. Importantly, the updated data did not change any of her
15 methodology or opinions, but it did yield slightly higher damages estimates,
16 meaning that the new numbers are in Dykzeul's, and not Charter's, favor.

17 Based on the updated Trial Exhibit 35 data, Aukstikalnis now calculates the
18 average annualized earnings for the 29 Turlock DSRs that worked between October
19 2015 and October 2018 to be \$35,577 and the median to be \$31,768 during the
20 three-year period (in her initial calculations, the average was \$30,346 and the
21 median was \$24,985 (Dkt. 143 at 3:24-26)); Dkt. 173-1, ¶ 8. As Aukstikalnis
22 explained in her trial testimony, utilizing the three-year average of *all* DSRs who
23 worked in Turlock is appropriate because it is based on actual data rather than
24 speculative assumptions, and because it accounts for the economic reality that some
25 DSRs may be stellar, others might enjoy only moderate success, and still others
26 may flounder and flame out quickly (as most DSRs do).⁹ 7/21/21 Tr. at 362:15-

27 _____
28 ⁹ Aukstikalnis testified that about 73.3% of Charter DSRs in Turlock between
October 2015 and October 2018 worked as a DSR for less than nine months.

1 363:1, 364:11-15, 370:14-25; Dkt. 143, at 4:4-5.

2 Dykzeul contends, and her expert Nutten assumes, that Dykzeul would have
3 been a superstar performer at Charter, but the only basis for this claim is Dykzeul's
4 hopes and beliefs and her testimony about how she *claims* to have performed in
5 other jobs. But there is no reason to believe Dykzeul's testimony that she
6 performed well in her other jobs.

7 To the contrary, Dykzeul is a serial job-hopper who, until her current job
8 with Goldco, regularly changed jobs every few months. Dkt. 143, ¶ 17; *see also*
9 *supra*, Section III.F. Dykzeul has worked for 11 different employers since 2011
10 with an average length of employment of 8.6 months. *Id.* Looking at just the three
11 jobs that Dykzeul held in the five years before her Charter application, her average
12 length of employment was 9.6 months. *Id.* As of the trial in July 2021, Dykzeul
13 has held eight different jobs since her Charter application with an average job
14 length of 8 months. *Id.*

15 Moreover, the records and testimony of the human resources representative
16 from Patient Care establish that Dykzeul was an underachiever who struggled to
17 make sales, was disorganized, and ultimately was terminated for poor performance.
18 Dkt. 165, TE 55, pp. 11-14; Dkt. 158, 7/22/21 Tr. at 7:8-13, 11:14-15:25, 19:23-
19 20:21. Dykzeul tried to hide this fact by lying, under oath, about her performance
20 at Patient Care (claiming she got a stellar 90-day review when in fact it reflected
21 poor performance), asserting she did not to know why her employment there was
22 terminated, and also improperly redacting the records from Patient Care in the
23 apparent hope that Charter and the Court would never learn the truth. In light of
24 Dykzeul's serial efforts to obstruct the truth about her time at Patient Care, there is
25 no reason to believe her claims about her allegedly great performance at any other
26 job and reason to believe she would have been a superstar performer at Charter. To
27 the contrary, there is every reason to believe that Dykzeul would have washed out
28 at Charter well before nine months passed.

1 Being charitable and disregarding the weight of evidence that Dykzeul would
2 not have been a successful DSR at Charter, the best and most neutral predictor of
3 how Dykzeul would have performed had she been hired at Charter would be to look
4 at how others who worked during the same time period and in the same region
5 actually fared during the same time period. Using a three-year average of DSR
6 earnings as the back pay rate avoids unnecessary speculation and better reflects
7 what Dykzeul could be expected to have earned had Charter hired her. That is what
8 Charter's expert, Aulkstikalnis, did in forming her opinions. 7/21/21 Tr. at 362:15-
9 363:1.

10 In contrast, Dykzeul's expert, Nutten, offers two damages models that
11 disregard all the real-world data and rely on statements about earning "potential"
12 from a job advertisement. In these models, Nutten asks the Court to simply assume
13 Dykzeul would have been a top performing DSR at Charter because she had sales
14 experience before she applied with Charter and because she has had some success
15 in at least one sales position since her Charter application. But that is a false
16 equivalency. As Dykzeul's own experience confirms, success in one sales position
17 is not necessarily predictive of success in others. Case in point: she has apparently
18 found success at Goldco but Patient Care fired her because she did not perform well
19 for them.

20 In creating his first two damages models, Nutten next assumes that, as a
21 high-achieving DSR, Dykzeul would have made either \$100,000 or \$75,000 a year
22 in total compensation based on a job description in an advertisement that provided
23 those two figures as examples of a DSR's earnings "potential" *if sales targets are*
24 *met*. Specifically, the advertisement states, in relevant part: "*If sales targets are*
25 *met*, the average earning *potential* is \$75k. The top tier reps *can* make upwards of
26 100K!" Ex. 29 (emphasis added).

27 As Swift testified, the claims made in the job advertisement were accurate
28 because they described earnings "potential" if a DSR met all of his or her sales

1 targets. 7/21/21 Tr. at 220:21-222:8. However, the vast majority of DSRs did not
2 meet those targets or achieve those potential earnings. *Id.* Specifically, the targets
3 referenced in the advertisement referred to DSRs that regularly met their sales
4 targets of 21 “triple play” sales (cable, internet and phone service) each month. *Id.*
5 In 2015, Swift only had *one* DSR who regularly met that sales target each month.
6 7/21/21 Tr. at 222:9-24. Damages models should be based on facts and data, not
7 puffery from a job advertisement about earning “potential” that was only achieved
8 by one person.

9 In reality, sales jobs vary widely in terms of product demand elasticity,
10 compensation structure, and conditions. For example, at Goldco, Dykzeul sells
11 gold and silver and receives 3.5% commission for the former and 5% for the latter.
12 Dkt. 142, ¶ 27. Customers are required to make minimum purchases of \$10,000 for
13 cash accounts and \$25,000 for retirement accounts. *Id.* This means Dykzeul makes
14 a minimum of \$350-\$875 for each gold and \$500-\$1,250 for each silver sale.
15 Contrast Dykzeul’s ability to earn commissions at Goldco with Charter’s DSR
16 commission plan, under which Dykzeul would have received a flat sum for each
17 sale, which varied depending on whether she sold bundled or single services, and
18 whether she qualified for accelerators that would increase the amount of the fixed
19 sum based on her number of sales. TE 9. But before she would be eligible to
20 receive commissions at all, Dykzeul would have had to sell a minimum of 10
21 “triple plays” each commission period.¹⁰ *Id.* at p. 5. In other words, even if she had
22 100 internet sales and 100 “double play” sales, but 9 or fewer “triple play” sales,
23 Dykzeul would have received zero in commissions.

24 The earnings data reflects that a meager *1 out of 29 DSRs (approximately*
25 *3%)* in Turlock between October 2015 and October 2018 actually earned more than
26 \$75,000 a year. Dkt. 143 at 3:27-28. Further, as Swift explained at trial, it is

27 ¹⁰ A “triple play” is a bundle of all three Charter services while a “double play is a
28 bundle of internet and either cable or telephone.

1 difficult for DSRs to make sales, the position has a high turnover rate, and DSRs
2 typically left because they couldn't make enough money and had to deal with the
3 rejection they "receive every day which is probably about 98 percent of the people"
4 they encounter. 7/21/21 Trial Tr. at 236:16-22; 237:20-280:21. Blond and Amaral,
5 who were called by Dykzeul, also corroborated that it was difficult to make a lot of
6 money as a DSR. Amaral testified that while she was able to meet the minimum
7 threshold and sell enough to "keep [her] employment," she never sold enough to
8 qualify for the commission accelerators. 7/20/21 Trial Tr. at 109:18-110:6. She
9 also confirmed that DSRs faced a lot of rejections ("We would play a game of see
10 who got the record of how many nos they would hit that day."). *Id.* at 117:7-10
11 Blond testified that while he did relatively well in his first month, making \$14,000
12 in base plus commissions, his total compensation went down to \$6,000 in the
13 second month, \$2,500 the month after that, and then \$1,500 in his last month as a
14 DSR, when he finally decided to quit because he wasn't sure he was even going to
15 have enough qualifying sales to meet the minimum threshold to be eligible for
16 commissions. *Id.* at 73:6-75:3. Notably, Blond's precipitous drop in sales
17 coincided with the time period when he started taking some Saturdays off. *Id.* at
18 65:5-10.

19 In sum, Dykzeul's approach to calculating back pay relies entirely on
20 speculative and unsupported assumptions, while Charter's models look at what the
21 average DSR actually made during the relevant time period as the measure of
22 Dykzeul's lost earnings. Nutten's first two models should thus be disregarded as
23 unhelpful and not based on the evidence, while Aukstikalnis's models should be
24 accepted, to the extent any damages analysis is necessary in this case.

25 3. *Dykzeul's Third Damages Model Should Be Disregarded*
26 *Because It Utilizes Unreliable Methodology Based On*
Unrepresentative, Cherry-Picked Data

27 Nutten's third damages model, which uses a weighted average to estimate
28 Dykzeul's lost earnings, should be disregarded because the methodology he

1 employs of picking and choosing favorable data while ignoring unfavorable data
2 renders his calculations speculative and unreliable.

3 Nutten arrived at the weighted average he uses by cherry picking the earnings
4 of six of the longest tenured and disproportionately higher-earning Turlock DSRs,
5 while ignoring the earnings of the other 23 DSRs in the available data set. In other
6 words, Nutten uses data that is most favorable to Dykzeul while excluding the most
7 unfavorable. By ignoring the earnings of approximately 80% of the Turlock DSRs
8 during the three-year period after Dykzeul's Charter application, Nutten estimates
9 Dykeul's lost earnings using what is in effect a "successful DSR" average. As
10 discussed, however, there is no objective or reliable basis to assume that Dykzeul
11 would have been a long-term successful DSR.

12 " 'Cherry-picking' data is essentially the converse of omitting it: just as
13 omitting data might distort the result by overlooking unfavorable data, cherry-
14 picking data produces a misleadingly favorable result by looking only to 'good'
15 outcomes." *E.E.O.C. v. Freeman*, 778 F.3d 463, 469-70 (4th Cir. 2015) (Agee, J.,
16 concurring). Because Nutten's third model is based on cherry-picked data that was
17 designed to produce an overly-favorable result, it is based on unsound methodology
18 and is not an appropriate, reliable, or useful measure of damages. It should be
19 disregarded.

20 4. *Dykzeul's Damages Models Also Inflate The Value Of Her*
21 *Alleged Lost Benefits From Charter*

22 Nutten estimated the value of benefits Dykzeul would have received as a
23 Charter DSR to be 17% of her earnings each year. According to Nutten, that
24 percentage is based on generalized Bureau of Labor Statistics benefits data that
25 included benefits that Dykzeul would not have received as a DSR. Dkt. 141, ¶ 6.
26 Aukstikalnis, on the other hand, estimated the value of the two specific types of
27 benefits for which Dykzeul would have been eligible, medical insurance and
28 retirement benefits.

1 Aukstikalnis estimated the value of Charter health benefits using data from
2 the 2015 and 2016 Kaiser Family Foundation Annual Employer Health Benefits
3 Survey. Dkt. 143, ¶ 26. According to that survey, the average employer
4 contribution for health benefits, all plan types, was \$5,176 in 2015, \$5,306 in 2016,
5 and \$5,477 in 2017. *Id.* For retirement benefits, because DSRs are eligible to
6 participate in a company 401(k) saving plan with an employer match of up to 3% of
7 wages, Aukstikalnis assumed Dykzeul would have made contributions to the 401(k)
8 plan had she been hired and received the maximum company 401(k) matching
9 contribution of 3%. Dkt. 143, ¶ 27.

10 Under Nutten's methodology, the value of Dykzeul's benefits arbitrarily and
11 inexplicably increase the more she is projected to earn. For example, in his
12 Opinion 2, Nutten assumes Dykzeul would have earned \$75,000 a year as a DSR
13 and values her lost benefits at \$12,750 per year (17% x \$75,000). In his Opinion 1,
14 Nutten assumes that Dykzeul would have earned \$100,000 a year and thus values
15 her lost benefits at \$17,000 per year (17% x \$100,000). But Nutten offers no
16 explanation why, for example, the same medical insurance is worth more if
17 Dykzeul earned \$100,000 annually instead of \$75,000.

18 Nutten's method for valuing Dykzeul's lost Charter benefits is unsound,
19 overly generalized, and speculative. The Court should reject his approach and
20 adopt Aukstikalnis' values based on the estimated costs of the specific benefits that
21 Dykzeul would have been eligible for as a DSR, as follows:

22

	2015 (Oct-Dec)	2016	2017
23 Health Benefits	\$1,248	\$5,306	\$5,477
24 401(k) Match	3% of earnings	3% of earnings	3% of earnings

25

26 5. *Dykzeul Fully Mitigated Her Economic Losses By 2017*

27 Dykzeul's earnings and value of benefits from her post-Charter employment,
28

pursuant to the parties' stipulation, are as follows: \$2,823 in the 2.5 months between mid-October and December 2015; \$26,944.39 in 2016; \$71,449.01 in 2017; \$33,574.96 in 2018; \$46,534.05; and \$140,946.19 in 2020. SF Nos. 20-38.

As noted, Charter's expert, Aukstikalnis, calculated Dykzeul's estimated lost earnings using the \$35,577 average annual earnings of DSRs in Turlock for the three-year period after Dykzeul's application, and she valued Dykzeul's lost benefits using an estimate of what the employer cost would have been for health insurance and the 401(k)-employer match. She then offset the total of Dykzeul's estimated Charter earnings and benefits with Dykzeul's actual earnings each year to determine Dykzeul's economic loss. Aukstikalnis' calculations of Dykzeul's lost earnings and benefits are reflected in the table below. *See* Dkt. 173-1, Ex. 8 – Scenario 1.

		2015	2016	2017	
Estimated Charter Earnings		\$8,572	\$35,577	\$35,577	
Estimated Charter Benefits	Health	\$1,248	\$5,306	\$5,477	
	401(k)	\$257	\$1,067	\$1,067	
Total Expected Charter Compensation for Dykzeul		\$10,077	\$41,950	\$42,121	
Less Dykzeul's Actual, Real-World Earnings and Benefits		(\$2,823)	(\$26,944)	(\$71,449)	
Total Economic Loss		\$7,254	\$15,006	\$0	\$22,259

As the Court can see, the total of Dykzeul's actual wages and value of benefits received from subsequent employment in 2017 exceeded her estimated Charter earnings and benefits for the year. The same is true under Nutten's third damages model. Nutten confirmed in his testimony that Dykzeul earned more in 2017 (\$58,849) than what even he projects her expected annual earnings at Charter

1 would have been using his cherry-picked average (\$57,349) of Turlock DSR
2 earnings in his third model. 07/21/21 Trial Tr. at 268:4-269:16; TE 26, Nutton's
3 Sched. 4. Accordingly, under the only two damages models that utilizes actual
4 data, rather than advertising statements, Dykzeul fully mitigated her economic
5 losses in 2017. Dkt. 143, ¶ 28; see *Abila v. Amec Foster Wheeler USA Corp.*, 216
6 F. Supp. 3d 778, 786 (S.D. Tex. 2016) (holding that the plaintiff was not entitled to
7 back pay or front pay as of the calendar year that he earned more through
8 subsequent employment than he earned or would have earned with the defendant).

9 6. *The Court Should Cut Off The Back Pay Period No Later Than*
10 *October 2017 When Dykzeul Secured A Higher-Paying And*
11 *Substantially Equivalent Position*

12 As discussed, Dykzeul fully mitigated her economic losses by 2017 if the
13 Court uses the average annualized earnings for Turlock DSRs during the three-year
14 period after Dykzeul's application to estimate her earnings, and estimated employer
15 costs to value the benefits she would have received, had Charter hired her for the
16 DSR position in October 2015. If the Court believes, however, that some other rate
17 should be used to estimate Dyzeul's lost Charter earnings and benefits, it should
18 nevertheless cut off the back pay period no later than October 2017, regardless what
19 measure the Court uses, when Dykzeul obtained a higher-paying full-time sales
20 position with Patient Care that was substantially equivalent to the Charter DSR
21 position.¹¹

22 An award for back pay in a failure-to-hire case is generally computed from
23 the date of the refusal to hire until the date of final judgment. *Thorne v. City of El*
24 *Segundo*, 802 F.2d 1131, 1136 (9th Cir. 1986). But "the victim of discrimination
25 who finds a better or substantially equivalent job no longer suffers ongoing injury

26 ¹¹ Dykzeul asks the Court to award her back pay for the 50.5 months between
27 October 15, 2015, through December 31, 2019; the time of her interview with
28 Charter to when, according to her expert, she fully mitigated her economic losses
with Goldco. See Dkt. 141, ¶¶ 8, 46 ("Thus, I have capped her economic loss as of
the end of 2019, since she fully mitigated her losses in 2020.").

1 stemming from the unlawful discrimination.” *Ford Motor Co. v. EEOC*, 458 U.S.
2 219, 236 (1982). Thus, “[w]hen a plaintiff finds employment that is equivalent or
3 better than the position she was wrongly denied, the right to damages ends because
4 it is no longer necessary to achieve an equitable purpose; the plaintiff at that point
5 has been restored to the position she would have been in absent the discrimination.”
6 *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 84 (3d Cir. 2009). California
7 law is the same. *Alexander v. Cmty. Hosp. of Long Beach*, 46 Cal. App. 5th 238,
8 267 (2020) (holding in a wrongful discharge case that “[o]nce plaintiffs obtained
9 and retained (for a year) comparable subsequent employment . . . , their damages
10 from their termination from [the defendant] ceased.”).

11 A position is substantially equivalent when it provides comparable status,
12 pay, job responsibilities, working conditions, and promotional opportunities.
13 *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1138 (5th Cir. 1988). “In
14 considering whether substantially equivalent job opportunities are reasonably
15 available, courts should first and foremost consider compensation.” *Tudor v. Se.*
16 *Oklahoma State Univ.*, 13 F.4th 1019, 1042 (10th Cir. 2021). Thus, higher-paying
17 subsequent employment perforce ends an employment discrimination plaintiff’s
18 entitlement to back pay. *See, e.g., Palasota*, 499 F.3d at 486. (“Certain events or
19 circumstances may serve to cut off an employee’s entitlement to back pay prior to
20 the date of the judgment, such as, for example, the plaintiff’s employment in a
21 higher-paying job”); *Stephens v. C.I.T. Grp./Equip. Fin., Inc.*, 955 F.2d 1023,
22 1029 (5th Cir. 1992) (“[D]amages are ‘settled and complete’ and the back pay
23 period ends, when the plaintiff begins earning more at his new job than he did at the
24 job from which he was discharged.”); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874
25 (1st Cir. 1982) (holding that the relevant period for calculation of back pay was the
26 date of unlawful termination to the date plaintiff received a raise from subsequent
27 employer and thus began earning more with his new employer); *Gaffney v.*
28 *Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 463 (7th Cir. 2006) (“[I]n the

1 context of Title VII, a plaintiff is eligible for back pay from the date of her injury to
2 the date that she acquires a higher-paying job.”); *Nordquist v. Uddeholm Corp.*, 615
3 F. Supp. 1191, 1204 (D. Conn. 1985) (holding that back pay is calculated from “the
4 date of termination to the date of employment at equal or higher salary if the
5 plaintiff was fortunate enough to obtain such employment prior to the date of
6 trial”); *Watlington v. University of Puerto Rico*, 751 F. Supp. 318, 332 (D. Puerto
7 Rico 1990) (“[D]amages for back pay cease when the plaintiff begins to earn higher
8 wages than what he would have received from his previous job.”).

9 Dykzeul accepted a full-time sales position as an account manager with
10 Patient Care in October 2017. Dkt. 142, ¶ 23. The Patient Care position was
11 higher-paying and substantially equivalent to the Charter DSR position in all
12 material respects. Both were full-time sales positions. *Id.* As a DSR, Dykzeul
13 would have been going door-to-door to residential homes selling cable, internet,
14 and televisions services, and as an account manager with Patient Care Dykzeul
15 traveled to various healthcare providers selling dialysis products to patients. *Id.*

16 The parties have stipulated that Dykzeul would have earned an annual base
17 salary of \$20,800 plus commissions and benefits had Charter hired her as a DSR in
18 October 2015. SF No. 18. Patient Care paid Dykzeul an annual base salary of
19 \$70,000 plus commissions and benefits. Dkt. 142, ¶ 23. Dykzeul’s annual base
20 salary at Patient Care thus exceeded what her base salary would have been at
21 Charter by \$49,200.

22 In fact, Dykzeul’s annual base salary at Patient Care exceeded what the total
23 of her base salary plus benefits would have been under all three of Nutten’s
24 scenarios. As noted, Nutten estimates Dykzeul’s lost Charter benefits as 17% of
25 projected earnings. Dkt. 141, ¶ 6. Under his Scenario 1, his most generous, he
26 assumes that Dykzeul would have earned \$100,000 in total annual compensation
27 (base salary plus commissions) at Charter and thus values lost benefits at \$17,000 a
28 year. *Id.* ¶¶ 13-14. Adding the highest annual value that Nutten assigns to lost

1 Charter benefits (\$17,000) to what would have been Dykzeul's annual Charter base
2 salary (\$20,800) is still \$37,200 less than what just her annual base salary was at
3 Patient Care (\$70,000). TE 26, Sched. 2. Thus, Dykzeul's fixed compensation at
4 Patient Care, which would her base salary and benefits, was significantly better at
5 Patient Care than what it would have been at Charter.

6 Because the account manager position with Patient Care was higher-paying
7 and in all other relevant respects substantially equivalent to the DSR position,
8 Dykzeul's entitlement to back pay ceased when she accepted the position with
9 Patient Care in October 2017. As the Supreme Court has explained, "the
10 availability of [a] better job terminates the ongoing ill effects of the defendant's
11 refusal to hire the claimant. . . . continuing to hold [a defendant] responsible for
12 back pay after [an applicant] lost [a better] job [] would be to require, in effect, that
13 [the defendant] insure them against the risks of unemployment in a new and
14 independent undertaking. Such a rule would not merely restore [applicants] to the
15 position where they would have been were it not for the unlawful discrimination[];
16 it would catapult them into a better position than they would have enjoyed in the
17 absence of discrimination. *Ford Motor*, 458 U.S. at 234 (1982).

18 Dykzeul's right to back pay ended no later than October 31, 2017, because
19 "[o]nce [she] obtained and retained . . . comparable subsequent employment at
20 [Patient Care], [her] damages from [Charter's refusal to hire] ceased." *Alexander*,
21 46 Cal. App. 5th at 267. Accordingly, if the Court decides to use a back pay rate
22 higher than the average annual earnings for Turlock DSRs, Dykzeul's back pay
23 should be calculated by deducting her actual post-Charter earnings and benefits
24 (stipulated to by the parties) for the approximate 24.5-month period between
25 October 15, 2015, and October 31, 2017, from her estimated lost Charter earnings
26 and benefits for the same period.¹²

27 ¹² As discussed above, if the Court adopts Charter's method of estimating
28 Dykzeul's lost earnings and benefits, Dykzeul fully mitigated her economic losses in
2017 and her back pay period would be October 15, 2015, through December 2016.

7. *Dykzeul Failed To Exercise Reasonable Care To Maintain Substantially Equivalent Employment*¹³

Under both federal and California law, Dykzeul had a duty to mitigate any potential lost earnings she may have suffered because Charter did not hire her for the DSR position. *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1020 (9th Cir. 2000) (federal law); *Parker v. Twentieth Century–Fox Film Corp.*, 3 Cal.3d 176, 181–182 (1970) (California law). That duty required her to exercise reasonable diligence to search for *and maintain* comparable employment. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 937 (5th Cir. 1996); *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277 (4th Cir. 1985) (“[W]e are of the opinion the Title VII claimant must also use reasonable diligence to maintain any suitable employment which is secured.”); *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992) (“A Title VII claimant has a duty to mitigate damages by exercising reasonable diligence to . . . maintain a suitable job once it is located.”). “Although the employer has the initial burden of proof regarding a [plaintiff’s] failure to mitigate, the burden shifts to the [plaintiff] where comparable employment is found but later lost.” *Palasota v. Haggard Clothing Co.*, 499 F.3d 474, 486 (5th Cir. 2007).

Dykzeul’s employment with Patient Care was superior to the Charter DSR position because it was higher-paying and substantially equivalent in all other material respects. She earned a significantly higher annual base salary with Patient Care (\$70,000) than she would have as a DSR (\$20,800), and both roles were full-time sales positions offering benefits and incentive-based compensation.

Patient Care terminated Dykzeul’s employment effective as of April 30,

¹³ Dykzeul misrepresents to the Court in her brief that “Charter stipulated that Dykzeul made reasonable efforts to mitigate her damages.” Dkt. 170, Pl.’s Br. at 18:21-19. While Charter has stipulated that Dykzeul made reasonable efforts to *obtain* employment after she applied for the DSR position, *see* SF No. 19, it has consistently contended that she failed to exercise reasonable care to *maintain* comparable employment when she was terminated for cause by Patient Care.

1 2018. Dkt. 158, 7/22/21 Trial Tr. at 19:23-20:14. Although Dykzeul did her best to
2 conceal the real reason why Patient Care terminated her employment, Seoane,
3 Patient Care's HR Director, testified that Patient Care terminated Dykzeul's
4 employment for performance reasons, which were documented contemporaneously
5 by Dykzeul's supervisor. Specifically, Dykzeul was terminated because of her lack
6 of preparation and clinical and product knowledge. Dkt. 165, TE 55, pp. 11-14;
7 Dkt. 158, 7/22/21 Trial Tr. at 11:14-15:25.

8 A plaintiff fails to reasonably mitigate damages when she is involuntarily
9 discharged from substantially equivalent or comparable employment due to
10 misconduct or performance reasons. *Johnson v. Spencer Press of Maine, Inc.*, 364
11 F.3d 368, 379 (1st Cir. 2004); *Brady*, 753 F.2d at 1277. Thus, "[w]here the jury
12 determines the employee was fired from a substantially similar position for cause,
13 any amount the employee with reasonable effort could have earned by retaining that
14 employment should be deducted from the amount of damages which otherwise
15 would have been awarded to the employee" *Stanchfield v. Hamer Toyota,*
16 *Inc.*, 37 Cal. App. 4th 1495, 1502-03 (1995) (applying California law).

17 Dykzeul failed to mitigate her damages when Patient Care terminated her
18 employment for cause. Consequently, the Court should offset and deduct the
19 amounts that Dykzeul would have earned had Patient Care not terminated her
20 employment for cause from the date of her termination until such time she once
21 again obtained substantially equivalent employment. *Brady*, 753 F.2d at 1273;
22 *Knickerbocker Plastics Co.*, 132 NLRB 1209, 1215 (1961).

23 Patient Care terminated Dykzeul's employment for performance related
24 reasons effective April 30, 2018. While employed by Patient Care, she received
25 and annual base salary of \$70,000 plus commissions and benefits. She
26 subsequently accepted a substantially equivalent sales position with Goldco in "the
27 middle" of February 2019. Therefore, for the period between May 1, 2018 and
28 February 14, 2019 (9.5 months), Charter is entitled to a minimum offset of \$55,417,

1 which represents Dykzeul's prorated earnings had Patient Care not terminated her
2 employment.¹⁴

3 8. *Summary Of Back Pay Calculation*

4 For the reasons discussed above, the Court should use the average annual
5 earnings of all Turlock DSRs during the three-year period after Dykzeul's
6 application to estimate the value of her lost Charter earnings and benefits and find
7 that: (1) Dykzeul fully mitigated by 2017 when her actual compensation, including
8 earnings and benefits, exceeded what her expected compensation would have been
9 had Charter hired her in October 2015, *see supra* Section V.A.5; (2) the appropriate
10 back pay period is October 2015 through December 2016; and (3) Dykzeul's total
11 economic loss is no more than \$22,259.

12 If the Court disagrees with Charter's approach and ultimately determines that
13 a rate higher than the average annual earnings of all Turlock DSRs should be used
14 to estimate Dykzeul's expected lost Charter earnings and benefits, the Court should
15 find that the back pay period terminates no later than October 2017, when Dykzeul
16 obtained a full-time sales position with Patient Care that was higher-paying and
17 substantially equivalent to the Charter DSR position in all other material respects.

18 Finally, if for any reason the Court decides that a back pay period extending
19 beyond October 2017 is appropriate, it should find that Charter is entitled to a
20 minimum offset of \$55,417 from any resulting backpay award, which represents her
21 prorated Patient Care base salary for the period between May 1, 2018 (Patient Care
22 date of termination), and February 14, 2019 (Goldco date of hire) (9.5 months).

23 **B. The Court Should Deny Dykzeul's Request For Prejudgment**
24 **Interest Because The Amount Of Her Damages Were Not Readily**
25 **Ascertainable**

26 Dykzeul asks the Court to award her prejudgment interest on her lost
27 earnings and benefits. Prejudgment interest in a Title VII case is discretionary.
28 *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir. 1984). "The

¹⁴ \$5,833 monthly base salary (\$70,000/12) x 9.5 months = \$55,413.

1 decision of whether to grant or deny prejudgment interest is dependent upon
2 ‘whether the amount of damages is easily ascertainable.’ ” *Donnelly v. Yellow*
3 *Freight Systems, Inc.*, 874 F.2d 402, 411 (7th Cir. 1989); *Maksymchuk v. Frank*,
4 987 F.2d 1072, 1077 (4th Cir. 1993) (“Prejudgment interest is commonly denied
5 when the back pay award is not readily determinable or when the plaintiff fails to
6 raise the issue in a timely or an appropriate manner.”). “The fact that the amount of
7 backpay is not readily determinable weighs against awarding prejudgment interest.”
8 *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir. 1984). “Courts
9 commonly decline to award pre-judgment interest when the back pay award is not
10 readily determinable or when the plaintiff fails to raise the issue in a timely or
11 appropriate manner.” *Peinado v. S. Pac. Transp. Co.*, No. C-92-545 MHP, 1996
12 WL 449184, at *3 (N.D. Cal. July 31, 1996); *see also E.E.O.C. v. Accurate Mech.*
13 *Contractors, Inc.*, 863 F. Supp. 828, 837 (E.D. Wis. 1994) (denying prejudgment
14 interest where plaintiff’s damages were not readily ascertainable; even though her
15 hourly rate of pay was easily determined, “calculating the period for which she was
16 entitled to backpay involved a subjective estimate as to the number of days that she
17 would have worked for [defendant] at the Niagara job site absent the discriminatory
18 conduct”).

19 In *Domingo*, the district court denied a request for prejudgment interest in an
20 employment discrimination case, where the employer provided room and board as
21 part of its employees’ compensation. 727 F.2d at 1446. The district court
22 considered the difference between the quality of housing that the employer
23 provided to “whites as opposed to nonwhites” to be a wage differential and awarded
24 back pay after discussing and considering various subjective factors that affect the
25 value of housing. *Ibid.* The Ninth Circuit affirmed the denial of prejudgment
26 interest, finding that denial was warranted “[i]n view of the many subjective factors
27 the court valued in determining the amount of damages.” *Ibid.*

28 Here, Dykzeul acknowledges that “[i]t is admittedly challenging to assess

1 economic loss in a failure to hire case, especially such as this one, where the
2 potential earnings are not fixed by salary, but variable based on sales
3 commissions.” Dkt. 170, Pl.’s Br. at 39:21-23. Because the primary component of
4 Dykzeul’s claim for back pay consists of incentive-based commissions, as her
5 expert puts it, “it is impossible to know precisely how much Dykzeul would have
6 earned had she been hired by Charter in 2015.” Dkt. 141, ¶ 9. Dykzeul herself has
7 presented the Court with three different projections of lost DSR earnings and
8 benefits; two using speculative figures from a job description and one using a
9 weighted average based on cherry-picked data. The alleged economic losses under
10 the three different scenarios vary widely, ranging from just over \$425,000, to
11 approximately \$258,000, to approximately \$145,000. Which scenario should be
12 chosen, according to Dykzeul, depends on whether the Court thinks she would have
13 been a “top-tier” or average DSR. As the foregoing demonstrates, the amount of
14 damages in this case are not readily determinable and, based on Dykzeul’s
15 methodology, require subjective determinations of how successful she would have
16 been as a DSR. The Court should therefore deny Dykzeul’s request for
17 prejudgment interest on her Title VII claims.

18 Neither is Dykzeul entitled to prejudgment interest on her FEHA claims.
19 Under California law, prejudgment interest is available if the recoverable damages
20 are “certain, or capable of being made certain by calculation.” Cal. Civ. Code §
21 3287(a). The standard for certainty under Section 3287(a) is “whether defendant
22 actually knows the amount owed or from reasonably available information could ...
23 have computed that amount.” *Roodenburg v. Pavestone Co., L.P.*, 171 Cal. App.
24 4th 185, 191 (2009) (internal citation and quotations omitted). In other words,
25 “[d]amages are deemed certain or capable of being made certain within the
26 provisions of subdivision (a) of section 3287 *where there is essentially no dispute*
27 *between the parties concerning the basis of computation of damages* if any are
28 recoverable but where their dispute centers on the issue of liability giving rise to

1 damage.” *Leff v. Gunter*, 33 Cal.3d 508, 189 (1983) (citation omitted) (emphasis
2 added).

3 In *Navarro v. DHL Glob. Forwarding*, No. CV15-5510-CAS(EX), 2017 WL
4 11647704 (C.D. Cal. Dec. 22, 2017), applying California law, the court denied the
5 prevailing plaintiff’s request for prejudgment interest in a FEHA discrimination and
6 wrongful termination case because the measure of the plaintiff’s lost-wages was not
7 “readily ascertainable” to the defendant on the date of plaintiff’s termination since
8 the plaintiff’s “total compensation varied considerably from year to year because he
9 did not have a guaranteed salary level.” *Id.* at *2.

10 The same dilemma exists in this case. Dykzeul never even worked as a DSR
11 and had she been hired her total compensation would not have been fixed. The
12 parties heavily dispute how Dykzeul’s lost Charter earnings and benefits should be
13 computed. Dykzeul herself presents the Court with three alternative methodologies
14 and Charter a fourth. Under the circumstances, there was no information that was
15 reasonably available to Charter at the time of Dykzeul’s non-hire from which it
16 could calculate her damages. Dykzeul, therefore, is not entitled to prejudgment
17 interest under California law, either.¹⁵ See *Sagadin v. Ripper*, 175 Cal. App. 3d

18
19 ¹⁵ Dykzeul’s expert includes prejudgment interest at a rate of 10% in his
20 calculations of her economic losses under all three of his scenarios. Although
21 prejudgment interest should be denied, if the Court concludes otherwise it should
22 not use the 10% rate that Dykzeul’s expert assumes in his scenarios and Charter
23 requests that the Court order supplemental briefing regarding the appropriate rate
24 that should be used to calculate prejudgment interest. Although Dykzeul does not
25 address the issue of the appropriate prejudgment interest rate in her brief, Charter
26 notes that a 10% rate does not appear to be authorized under either federal or
27 California law. Compare *Blankenship v. Liberty Life Assurance Co. of Boston*, 486
28 F.3d 620, 628 (9th Cir. 2007) (“Generally, the interest rate prescribed for post-
judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-
judgment interest.”) (internal quotation marks omitted), with *Bullock v. Philip
Morris USA, Inc.*, 198 Cal. App. 4th 543, 573 (2011) (“Absent a statutory provision
specifically governing the type of claim at issue, the prejudgment interest rate is 7
percent under article XV, section 1 of the California Constitution.”).

1 1141, 1175-76 (1985) (trial court abused discretion in awarding prejudgment
2 interest where “the amount of the actual damages suffered . . . remained uncertain
3 until some factfinder determined them).

4 **C. Dykzeul Did Not Suffer Any Serious Emotional Distress**

5 Dykzeul asks the Court to award her emotional distress damages “of at least
6 \$500,000.” But an award anywhere near that amount, on the facts of this case,
7 would be grossly excessive. *See, e.g., Hetzel v. Cty. of Prince William*, 89 F.3d
8 169, 171-72 (4th Cir. 1996) (reversing an award of \$500,000 for emotional distress
9 based almost entirely on the plaintiff’s brief, conclusory, and self-serving testimony
10 concerning stress, headaches, trouble reading to her daughter, and problems with
11 her family life allegedly caused by the employer’s actions as unsupported by the
12 “thin” evidence and excessive as a matter of law).

13 Dykzeul did not seek or receive treatment from any medical providers for her
14 alleged emotional distress and has no diagnosed mental disorder or illness. The
15 only evidence to support her exorbitant request is her uncorroborated self-serving
16 testimony that after her interview for the DSR position she: felt anxious and was
17 stressed about finances; worried that she might not find a full-time job again
18 because she “wanted to please God in keeping his Shabbat”; and felt withdrawn
19 because she had nobody to talk to. Dykzeul also cites to the fact that she cried at
20 trial as evidence of her severe emotional distress.

21 Regarding Dykzeul’s crying at trial, the point in the trial at which she cried
22 was when she claimed to the Court that she was distraught by Charter’s decision
23 not to hire her because this was the first time anything like this had happened to her.
24 According to her, she had “never been rejected from a job based solely on my faith
25 and keeping Shabat for 24 hours. Never. That’s never happened before.” 7/21/21
26 Tr. at 293:17-21. Yet, on cross-examination, Dykzeul admitted that she sued
27 another employer for discrimination and failure to accommodate her Sabbath
28 observance before her Charter application, although she unbelievably claimed not

1 to recall whether she had sought emotional distress damages in that case, too.
2 7/21/21 Tr. at 323:23-324:23. Charter respectfully acknowledges that testifying in
3 court can be a stressful experience, and that not getting a job offer can feel bad, but
4 this was but one job interview and one position (among many, many others) that
5 she did not get. Dykzeul's contention that not getting the DSR job offer caused her
6 \$500,000 worth of emotional distress and to doubt she would ever work full-time
7 again appears greatly exaggerated.

8 Dykzeul also testified that she did not seek mental health treatment because
9 she couldn't afford it, but she has made high five and six figures since her interview
10 and has never even bothered to check how much it would have cost to see a mental
11 health professional. Indeed, as of the trial in this action in July 2021 (nearly six
12 years after her interview), Dykzeul still has not sought treatment for her alleged
13 emotional distress, even though she made \$150,000 in the first six months of 2021
14 alone. Again, Dykzeul's claim that she suffered \$500,000 worth of emotional
15 distress appears greatly exaggerated, when she was not even bothered enough to
16 seek professional help.

17 This case does not involve a long-time employee who was subjected to a
18 hostile work environment or unlawfully terminated. Swift did not make any
19 derogatory or offensive remarks. Dykzeul was a job applicant who did not get the
20 job she applied for because she could not work Saturdays when working Saturdays
21 was a job requirement, and not, as she suggests, because she believes in God or
22 observes the Sabbath. Nor was she unemployed for an extended amount of time.
23 She found a part-time sales job within a couple of weeks of her interview with
24 Swift and a full-time sales job within five months. Since then, she has had multiple
25 part- and full-time sales jobs, making high five and six figures. Dykzeul has had no
26 problem finding work, and her assertion that she was worried she would never be
27 able to find a full-time job again lacks credibility.

28 In sum, Dykzeul's uncorroborated, self-serving, and dubious testimony does

1 not support a significant award for emotional distress. If Dykzeul suffered
2 emotional distress as a result of not getting the DSR job, it was the garden variety
3 type that usually attends when one gets passed over for a job, and should be valued,
4 if at all, in the thousands, not tens or hundreds of thousands, of dollars.

5 **D. The Evidence Does Not Support An Award Of Punitive Damages**

6 “Punitive damages are allowed in a Title VII action only under limited
7 circumstances.” *U.S. Equal Employment Opportunity Comm’n v. Consol Energy,*
8 *Inc.*, 860 F.3d 131, 150 (4th Cir. 2017). The relevant statutory provision permits
9 the recovery of punitive damages only if an employer “engaged in a discriminatory
10 practice or discriminatory practices with malice or with reckless indifference to the
11 federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1).
12 The Supreme Court has interpreted “reckless indifference” to mean “recklessness in
13 its subjective form” – i.e., to be liable for punitive damages, “an employer must at
14 least discriminate *in the face of a perceived risk* that its actions will violate federal
15 law.” *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535-536, 119 S. Ct. 2118, 2124–
16 25, 144 L. Ed. 2d 494 (1999) (emphasis added).

17 “In general, intentional discrimination is enough to establish punitive
18 damages liability.” *Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212
19 F.3d 493, 515 (9th Cir. 2000). But the Supreme Court stated in *Kolstad* that
20 “[t]here will be circumstances where intentional discrimination does not give rise to
21 punitive damages liability”:

22 In some instances, the employer may simply be unaware of the
23 relevant federal prohibition. There will be cases, moreover, in
24 which the employer discriminates with the distinct belief that its
25 discrimination is lawful. The underlying theory of discrimination
26 may be novel or otherwise poorly recognized, or an employer may
27 reasonably believe that its discrimination satisfies a bona fide
occupational qualification defense *or other statutory exception to*
liability.

28 *Kolstad*, 527 U.S. at 536-37 (emphasis added); *Passantino*, 212 F.3d at 515 (citing

1 *Kolstad*).

2 “Common to all of these exceptions is that they occur when the employer is
3 aware of the specific discriminatory conduct at issue, but nonetheless reasonably
4 believes that conduct is lawful. Under such circumstances, an employer may not be
5 liable for punitive damages.” *Passantino*, 212 F.3d at 515.

6 There is no evidence in this case that Swift’s decision not to hire Dykzeul
7 was motivated by ill will or discriminatory intent. Nor is there any evidence from
8 which it can be inferred that Swift made his decision “in the face of a perceived
9 risk” that it would violate federal laws. To the contrary, it is undisputed that Swift
10 *wanted* to hire Dykzeul, and the evidence at trial shows that he earnestly considered
11 whether he could accommodate Dykzeul’s request to work Sundays instead of
12 Saturdays. Though Swift eventually concluded that he could not do so because it
13 would be too much for him to work seven days a week with no days off, he did so
14 because he believed that the negative impact on his own work schedule would be
15 too great to bear.

16 In *Kolstad*, the Supreme Court stated that punitive damages are inappropriate
17 when an employer reasonably believes that a “statutory exception” to liability may
18 apply. 527 U.S. at 536-37. Undue hardship is a statutory defense to liability for
19 failure to accommodate religious beliefs and the Ninth Circuit, since *Hardison*, has
20 repeatedly held that undue hardship may be shown through a more than de minimis
21 impact on coworkers. *Bhatia*, 734 F.2d at 1384; *Balint*, 180 F.3d at 1054. Here,
22 Swift genuinely considered Dykzeul’s request to work Sundays instead of
23 Saturdays and made a good faith determination that accommodating her request
24 would cause too much of a burden on his own work schedule. Indeed, the Court
25 specifically held in its summary judgment order that a jury could reasonably
26 conclude on the facts of this case that the additional burdens on Swift amount to an
27 undue hardship. Dkt. 64 at p. 12. If a jury (or in this case the Court) can
28 reasonably conclude that the additional burdens imposed on Swift constitute undue

1 hardship, Swift's conclusion to that effect must necessarily have been reasonable.
2 When, as here, there is no evidence of religious hostility or discriminatory intent
3 and a manager comes to a reasonable – even if the Court determines incorrect –
4 belief that the impact of a particular accommodation would result in undue
5 hardship, punitive damages are improper. *See Passantino*, 212 F.3d at 515; *Sturgill*
6 *v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1035-36 (8th Cir. 2008) (reversing
7 award of punitive damages in religious accommodation case even though the jury
8 reasonably found that UPS failed to reasonably accommodate the plaintiff's
9 religion, where "[n]o UPS employee was shown to have acted with malice or
10 reckless indifference" to the plaintiff's accommodation request); *Canny v. Dr.*
11 *Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 904 (8th Cir. 2006) (visually
12 impaired route driver discharged due to safety concerns did not establish that
13 employer acted with malice necessary to sustain award of punitive damages);
14 *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1254-55 (10th Cir. 2005) (punitive
15 damage claim properly denied in a disability accommodation case where there was
16 no evidence that employer acted in bad faith or with malice in discharging plaintiff,
17 even though jury determined that this disability could reasonably have been
18 accommodated).

19 In sum, Swift did not intentionally discriminate against Dykzeul and there is
20 no evidence – certainly no clear and convincing evidence – he knew or perceived a
21 risk that denying Dykzeul's requested accommodation because of the burden it
22 would have on his own work schedule would constitute a violation of federal law.
23 Swift did not act with malice or reckless indifference to Dykzeul's rights and
24 punitive damages are inappropriate in this case.

25 Finally, even if Swift acted with the requisite malice or reckless indifference
26 in deciding not to hire Dykzeul, *which he did not*, there is still no basis to award
27 punitive damages against *Charter*. To justify an award of punitive damages against
28 an employer, "[t]he plaintiff must impute liability" to the company, and "an

1 employer may not be vicariously liable for the discriminatory employment
2 decisions of managerial agents where these decisions are contrary to the employer's
3 'good-faith efforts to comply with Title VII.' ” *Kolstad*, 527 U.S. at 539, 545.
4 Thus, employers “may now establish an affirmative defense to punitive damages
5 liability when they have a bona fide policy against discrimination[.]” *Passantino*,
6 212 F.3d at 516. The Ninth Circuit has explained that “*Kolstad* provided the
7 employer with a new ‘good faith’ defense, enabling it to escape punitive damages if
8 it can show that the challenged actions were not taken by senior managers and were
9 contrary to the employer’s good faith implementation of an effective
10 antidiscrimination policy.” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 864 (9th
11 Cir. 2002), *aff’d*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003).

12 While punitive damages may be awarded despite the existence of an
13 employer’s bona fide anti-discrimination policy if a plaintiff can show that the
14 employer failed to enforce the policy, *Bains LLC v. Arco Prod. Co., Div. of Atl.*
15 *Richfield Co.*, 405 F.3d 764, 774 (9th Cir. 2005), here the record is devoid of any
16 evidence that Charter failed to enforce its anti-discrimination policy. The evidence
17 in the record establishes that Charter had a bona fide anti-discrimination policy and
18 that Charter provided anti-discrimination training to its supervisors, including
19 Swift. *See* TE 31; TE 34. Dykzeul did not complain to Charter’s human resources
20 after her interview about possible discrimination; there is no evidence that someone
21 in a position to enforce the company’s anti-discrimination policy, like senior
22 managers or human resources personnel, ignored or abdicated their duties to
23 enforce the anti-discrimination policy; and there is no evidence that complaints of
24 discrimination made by others were ignored or improperly addressed. In the
25 absence of any evidence that Charter failed to enforce or implement its anti-
26 discrimination policy, Charter has met its burden to establish that it had a formal
27 anti-discrimination policy and that it made good faith efforts to comply with Title
28 VII. Punitive damages are therefore improper in this case, even assuming Swift

1 acted with the requisite malice or reckless indifference, which he did not.

2 **VI. CONCLUSION**

3 The preponderance of the evidence at trial establishes that Charter could not
4 have accommodated Dykzeul's unavailability to work Saturdays without incurring
5 undue hardship, and that Charter did not intentionally discriminate against Dykzeul
6 because of her religion when it decided not to hire her for the DSR position.
7 Judgment on Dykzeul's religious accommodation and intentional discrimination
8 claims under Title VII and the FEHA should therefore be entered against her and in
9 favor of Charter.

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11 Dated: January 28, 2022

MORGAN, LEWIS & BOCKIUS LLP

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